85-597

Supreme Court, U.S.
FILED
SEP 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

Typhoon Car Wash, Inc.,

Petitioner,

v.

Mobil Oil Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Robert J. Hennessey
Jon S. Swierzewski
LARKIN, HOFFMAN, DALY & LINDGREN, LTD.
1500 Northwestern Financial Center
7900 Xerxes Avenue South
Minneapolis, Minnesota 55431
Telephone: (612) 835-3800

Attorneys for
Petitioner Typhoon Car Wash, Inc.

QUESTION PRESENTED FOR REVIEW

Did the Temporary Emergency Court of Appeals ignore the precedents of this Court which establish guidelines for determining whether a later enacted regulatory scheme preempts the antitrust statutes?

TABLE OF CONTENTS

	Page
Opinions Below.....	2
Jurisdiction, Statutes, Regulations, and Rulings.....	4
Statement of the Case.....	5
Argument.....	21
Conclusion.....	41

TABLE OF AUTHORITIES

Page

Cases

Bulzan v. Atlantic Richfield Co., 620 F.2d 278 (Temp.Emer.Ct.App. 1980).... 40

Cities Service C. v. F.E.A., 529 F.2d 1016 (Temp.Emer.Ct.App. 1975), cert. denied, 426 U.S. 947 (1976)..... 41

Consumers Union of the United States, Inc. v. Sawhill, 525 F.2d 1068 (Temp.Emer.Ct.App. 1975)..... 40

Evanson v. Union Oil Co., [Transfer Binder 1974-80 Court Decisions] Energy Mgmt. (CCH) ¶26,056 (D.Minn. August 5, 1976)..... 35

Evanson v. Union Oil Co., [Transfer Binder 1974-80 Court Decisions] Energy Mgmt. (CCH) ¶26,158 (D.Minn. July 31, 1979)..... 34

General Crude Oil Co. v. Department of Energy, 585 F.2d 508 (Temp.Emer.Ct. App. 1978), cert. denied, 440 U.S. 912 (1979)..... 41

Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975)..... 23,33

Inter City Oil Co. v. Murphy Oil, Corp., 1 Energy Mgmt. (CCH) ¶ 9722 (D.Minn.

June 25, 1976).....31-33, 35-36

Marathon Oil Co. v. F.E.A., 547 F.2d 1140 (Temp.Emer.Ct.App. 1976), cert. denied, 430 U.S. 983 (1977).... 41

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)..... 33

Pacific Coast Meat Jobbers Association, Inc. v. Cost of Living Council, 481 F.2d 1388 (Temp.Emer.Ct.App. 1973)... 41

Silver v. New York Stock Exchange, 373 U.S. 341, reh'g denied, 375 U.S. 870 (1963)..... 23

United States v. National Association of Securities Dealers, 422 U.S. 694 (1975)..... 23,33

Statutes:

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 et seq..... Passim

Economic Stabilization Act of 1970, 84 Stat. 799 (1970) ..... Passim

Robinson-Patman Act, 15 U.S.C. § 13..... Passim

Regulations:

10 C.F.R. § 212.31.....7,8,26, 27

Rulings:

Cost of Living Council Ruling 1973-19, 38 Fed. Reg. 34,312 (1973)..... 9

Federal Energy Office Ruling 1974-17, 39 Fed. Reg. 21,043 (1974)..... 10

Federal Energy Office Ruling 1974-18, 39 Fed. Reg. 21,043 (1974)..... 10

Federal Energy Administration Ruling 1975-2, 40 Fed. Reg. 10,655 (1975)..... Passim

Other Authorities:

Rowe, Price Discrimination Under the Robinson-Patman Act..... 39

U.S. Department of Justice, Report on the Robinson-Patman Act (1977).... 40

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

Typhoon Car Wash, Inc.,

Petitioner,

v.

Mobil Oil Corporation,

Respondent.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Typhoon Car Wash, Inc. (Typhoon) petitions for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States to review an order of that court dated July 2, 1985.

---

1 Typhoon Car Wash, Inc. and Mobil Oil Corporation are the only parties in this action.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals reversing the district court judgment is not yet officially reported, but is unofficially reported at 4 Energy Mgmt. (CCH) ¶26,542 (Temp.Emer. Ct.App. July 2, 1985) (Appendix A-1). The orders issued by the district court on October 28, 1983 (Appendix A-9), July 13, 1984 (Appendix A-56), and on August 29, 1984 (Appendix A-84), are not reported.

JURISDICTION

The decision of the Temporary Emergency Court of Appeals was rendered on July 2, 1985. On July 16, 1985, Typhoon filed a petition for a rehearing en banc. The Temporary Emergency Court of Appeals' order denying the petition for rehearing was issued on August 7, 1985. The jurisdiction of the Supreme Court is invoked pursuant to Section 211(g) of the Economic Stabilization Act of 1970, 84 Stat. 799 (1970) as incorporated in the Emergency Petroleum Allocation Act, 15 U.S.C. § 751 et seq.[2]

---

2 Appendix A-89.

STATUTES, REGULATIONS, AND RULINGS INVOLVED

The statutes, regulations, and rulings involved in this matter are set forth verbatim in the Appendix.

Statutes:

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 et seq.

Economic Stabilization Act of 1970, 84 Stat. 799 (1970).

Robinson-Patman Act, 15 U.S.C. § 13.

Regulations:

10 C.F.R. Part 212, parts.

Rulings:

Cost of Living Council Ruling 1973-19, 38 Fed. Reg. 34,312 (1973).

Federal Energy Office Ruling 1974-17, 39 Fed. Reg. 21,043 (1974).

Federal Energy Office Ruling 1974-18, 39 Fed. Reg. 21,043 (1974).

Federal Energy Administration Ruling 1975-2, 40 Fed. Reg. 10,655 (1975).

STATEMENT OF THE CASE

Jurisdiction of all civil actions brought under the Economic Stabilization Act of 1970 (ESA) was exclusively vested in the district courts of the United States by § 211(a) of the ESA.[3] Jurisdiction over an appeal in a civil action was exclusively vested in the Temporary Emergency Court of Appeals by § 211(b)(2) of the ESA.[4]

The Congress of the United States, reacting to the Arab oil embargo of 1973, passed the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. § 751 et seq. Congress empowered and directed the President of the United States to establish

---

3 Appendix A-103.

4 Appendix A-103.

a regulatory scheme to deal with shortages of petroleum products or dislocations in their distribution.[5] Upon enactment of the Federal Energy Administration Act of 1974, 15 U.S.C. § 761 et seq. (May 7, 1974), implemented by Executive Order No. 11790, 3 C.F.R. 882 (1971-75 Compilation), the Federal Energy office was abolished and all authority delegated to the President by the EPAA was vested in the newly created Federal Energy Administration.

The Federal Energy Administration (FEA) established regulations to deal with the then current disruptions in the petroleum industry.[6] The regulations established a maximum allowable selling price which could

---

5 15 U.S.C. § 751(b); App. A-89.

6 In general, 10 C.F.R. Part 212 (1974).

not be exceeded without violating those regulations. The regulations provided that a refiner may not charge to any class of purchaser a price for a covered product higher than the weighted average price at which the product was lawfully priced in transactions with similar customers on May 15, 1973, plus certain increased costs.[7]

To determine the maximum allowable selling price, a refiner must first establish its proper classes of purchasers.

> "Class of purchaser" means purchasers to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers and other purchasers.[8]

Customary price differentials are defined at 10 C.F.R § 212.31:

---

7 10 C.F.R. §§ 212.82 and 212.83.

> 'Customary price differential' includes a price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery.

The regulations go on to define the means of calculating the maximum allowable selling price.[9]

The class of purchaser concept first arose under regulations established by the Cost of Living Counsel (CLC) under the authority of the Economic Stabilization Act of 1970, 84 Stat. 799 (1970). The CLC enacted the so-called Phase IV regulations in August 1973, 6 C.F.R. § 150 et seq.

---

8 10 C.F.R. § 212.31 (1974).

9 See 10 C.F.R. § 212.83(a); 10 C.F.R. § 212.83(a)(2).

Those regulations were subsequently adopted, in toto, by the Federal Energy Office (FEO) under the authority of the EPAA. The same regulations were continued by the FEA when it assumed the responsibility for regulating the petroleum industry.[10]

The government agencies from time to time issued rulings to explain and interpret their regulations. The agencies issued a number of rulings dealing with the class of purchaser concept. The first of these was Ruling 1973-19, 38 Fed. Reg. 34,312 (1973), issued by the CLC. The ruling made it clear there was to be a

---

10 The FEA was ultimately succeeded by the Department of Energy. For convenience, all references will be to the FEA, which promulgated the key ruling, 1975-2.

uniform selling price for all members of that class of purchaser, since no customary price differentials could exist within a class of purchaser.[11] The ruling said a class of purchaser was the smallest unit for which a uniform selling price may be computed.

Subsequently, questions were raised with respect to the treatment of discounts as customary price differentials when establishing classes of purchaser. The FEO issued Ruling 1974-18, 39 Fed. Reg. 21,043 (1974), which dealt with the difference between temporary competitive allowances and customary price differentials. In that ruling, the FEO created a rebuttable

---

11 This ruling was reissued nearly verbatim by the FEO as Ruling 1974-17, 39 Fed. Reg. 21,043 (1974).

presumption that all discounts in effect on May 15, 1973, which had existed for six months or more would be considered customary price differentials for which a class of purchaser must be established.

After issuance of that ruling, strong objections were raised by oil refiners to the use of the six month presumption. The refiners objected to the six month presumption, allegedly on the basis that the presumption conflicted with the Robinson-Patman Act.

The Robinson-Patman Act in general prohibits price distinctions between customers of the same product:

> Where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who

> either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a). The Robinson-Patman Act itself contains two defenses for price distinctions. The first is known as the "cost-justification" defense, contained in 15 U.S.C. § 13(a):

> Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

The second defense is the "meeting competition defense," contained in 15 U.S.C. § 13(b):

> Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any

> purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

In response to the refiner's objections, the Federal Energy Administration issued Ruling 1975-2, 40 Fed. Reg. 10,655 (1975). The FEA first explained the importance of the class of purchaser concept. It stated:

> Since the increased product costs are generally required to be applied equally among classes of purchasers of a particular covered product, differences in weighted average, May 15, 1973, selling prices among classes of purchaser are generally reflected in like differences in current lawful selling prices for that product among those classes of purchaser, and a principal function of the class of purchaser concept is to preserve the price distinctions among purchasers that customarily existed under free market conditions. To achieve the objective of making covered products available at equitable

> prices, FEA regulations require sellers to group together customers that are similarly situated and to compute a weighted average of their May 15, 1973, selling prices in sales to those customers. Sellers are thus required to maintain a single lawful selling price for a product to all customers that fall into a particular class, rather then having to establish individual maximum lawful prices to individual customers . . .
>
> The principal function of the doctrine is to maintain the price differentials that existed on May 15, 1973, between groups of purchasers which were not similarly situated then and are not now similarly situated.

Ruling 1975-2, 40 Fed. Reg. 10,655 at 10,656 (emphasis added).

Ruling 1975-2 was an explanation of what the regulations required. A refiner was required to first make distinctions based on the seller's location, the type of purchaser (i.e. level of distribution,

method of sale, or type of use), volumes purchased, or differences in terms of conditions of sale or delivery. Once divisions were made based on those criteria, there still might be differences between purchasers which required separate classes. The FEA noted:

> In cases where all of the foregoing analysis has been made, and a firm's purchasers have been grouped into appropriate categories, there may nevertheless exist differences in prices charged to purchasers within those groups. Such differences might simply reflect the varying competitive situations at the various times when contractual prices were agreed to, or they may, upon closer examination, represent customary price differentials that have resulted from factors which may not even have been consciously adverted to at the time, but which nevertheless can be objectively verified.
>
> It is in this area, where purchasers are ostensibly

> similarly situated, that price distinctions become potentially at odds with the policies intended to be furthered by the Robinson-Patman Act.

40 Fed. Reg. 10,655 at 10,657.

The FEA followed with factual examples, which it said illustrated the general principals stated in the ruling. In Example 7, which was relied upon by the district court, the FEA presented a factual situation virtually identical to that presented by Typhoon.[12] Any differences between the evidence presented by Typhoon and the facts of the example exist only in that Typhoon's proof went beyond that of the example. In the example, the FEA

---

12 Example 7 is at 40 Fed. Reg. 10,655 at 10,660. The district court's discussion of the applicability of the example is in the Memorandum and Order (October 28, 1983); App. A-37.

stated that for purposes of the petroleum price regulations:

> The higher volumes and the substantially greater investments in their stations of the car wash dealers are in themselves justifications under the Robinson-Patman Act for treating the car wash dealers differently.

40 Fed. Reg. 10,655 at 10,660.

Typhoon brought this action on April 22, 1980, alleging that Mobil violated § 210 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note (ESA), as incorporated by the Emergency Petroleum Allocation Act, 15 U.S.C. § 751 et seq. (EPAA), by failing to place Typhoon into the proper class of purchaser.[13]

---

13 Typhoon claimed Mobil should have established a class of purchaser consisting of all N tunnel-type car washes purchasing gasoline from Mobil's terminal in St. Paul, Minnesota.

Typhoon alleged that Mobil, as a result of having placed Typhoon into an incorrect class of purchaser, charged Typhoon a price in excess of that permitted by the EPAA and the petroleum pricing regulations.

Following discovery, Typhoon and Mobil agreed to submit this matter to United States Magistrate Brian P. Short on cross-motions for summary judgment. In connection with those motions, Typhoon and Mobil stipulated to certain facts. Among the facts to which the parties stipulated were facts which the district court found satisfied the objective factors required by Example 7 of Ruling 1975-2. Typhoon and Mobil also stipulated that if Mobil were found to have made an improper class of purchaser determination concerning Typhoon,

then Typhoon had been overcharged by Mobil under Section 210 of the Economic Stabilization Act, in an agreed-upon amount.

The Magistrate issued his first report and recommendation on June 10, 1983. He found that Mobil had violated the EPAA by incorrectly placing Typhoon in with all of Mobil's other retail-level customers, thus failing to preserve the customary price differential that existed between car washes such as Typhoon and Mobil's other retail-level customers. The Magistrate recommended that Typhoon be awarded summary judgment on the class of purchaser issue.

Judge Harry H. MacLaughlin of the United States District Court, following a de novo review, awarded Typhoon summary

judgment on the class of purchaser issue,[14] and on August 29, 1984, the district court entered judgment in Typhoon's favor.[15] Mobil appealed the judgment to the Temporary Emergency Court of Appeals on September 28, 1984. TECA reversed the judgment of the district court on July 2, 1985.[16]

---

14 Memorandum and Order (October 28, 1983); App. A-9.

15 App. A-84.

16 App. A-1.

ARGUMENT

The Temporary Emergency Court of Appeals erroneously reversed the district court's judgment in favor of Typhoon. The district court had determined that Ruling 1975-2 required that Mobil establish a class of purchaser consisting of car washes such as Typhoon. Mobil had claimed that it was required to remove Typhoon's discount due to the Robinson-Patman Act. The district court rejected that argument on the basis that the Robinson-Patman Act, to the extent it was inconsistent with petroleum pricing regulations, was preempted due to the pervasive nature of those as to maximum allowable selling price.

In its ruling, TECA addressed only one issue:

> Whether the FEA's regulations required Mobil to place Typhoon into a class of purchaser consisting of N tunnel-type car washes purchasing gasoline from Mobil's St. Paul, Minnesota, terminal?

In addressing that issue, TECA misconstrued Ruling 1975-2, saying the ruling required it to give literal effect to the Robinson-Patman Act. Specifically, TECA misconstrued Ruling 1975-2 as requiring proof of cost justification to the standard established by court and Federal Trade Commission decisions construing the RPA. Typhoon to prove its discount was cost-justified literally under the Robinson-Patman Act. TECA's interpretation was premised upon its conclusion that there was no immunity from the antitrust statutes for actions taken in compliance with the

petroleum pricing regulations establishing maximum allowable selling prices.

TECA's rejection of the claim of antitrust immunity for compliance with the maximum allowable selling price regulations is inconsistent with this Court's numerous precedents permitting preemption, when appropriate. In the cases of United States v. National Association of Securities Dealers, 422 U.S. 694 (1975), Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975), and Silver v. New York Stock Exchange, 373 U.S. 341, reh'g denied, 375 U.S. 870 (1963), this court has acknowledged the concept that a limited antitrust immunity is appropriate when necessary for the proper functioning of a pervasive regulatory scheme. There is no

question that the FEA's regulation of maximum allowable selling prices was pervasive.

The agencies at all times regulated the maximum allowable price for which petroleum products could be sold. The regulations thus supplanted the market mechanisms which the antitrust statutes were intended to maintain. The price regulations were supported by both criminal and civil sanctions.[17]

This regulatory scheme was enacted at a time of national emergency. In late 1973, the Arab countries declared an embargo on oil shipments to the United States. Congress in response to this embargo

---

17 Sections 208 and 210 of the ESA, and A-89, and 15 U.S.C.S. § 754; App. A-103.

enacted the EPAA. As the name of the act implies, the purpose of this emergency legislation was to insure the equitable distribution of petroleum products at equitable prices to all regions of the country and to all sectors of the petroleum industry. To carry out this purpose Congress gave the President authority, which he delegated to the FEA, to promulgate regulations controlling the price of petroleum products. It is clear that when dealing with petroleum prices, and in particular when dealing with the regulations which the agency itself established, the FEA is dealing in an area for which it has specific congressional authority and considerable expertise.

The FEA utilized that expertise in establishing the petroleum pricing scheme. The very foundation of the pricing scheme was the concept of the class of purchaser. Before a refiner could begin to determine its maximum allowable selling prices, it must determine the class structure into which its customers should be placed.

The FEA issued regulations defining a class of purchaser as:

> . . . Purchasers to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers and other purchasers.

10 C.F.R. § 212.31 (1975). In determining its classes of purchasers, a refiner must determine which price differences between its customers were customary. The FEA defined a customary price differential as:

> A price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery.

10 C.F.R. § 212.31 (1974).

In this case, Typhoon alleged that the discount it was receiving from Mobil constituted a customary price differential, which the regulation required be considered when setting classes of purchasers. Mobil alleged instead that it was a competitive discount. Mobil claimed the regulations and rulings required it to comply with the antitrust statutes in literal terms. Mobil thus claimed it must disregard Typhoon's discount when establishing classes of purchasers.

It should be noted that the courts in this case have not been faced with an antitrust claim. Mobil has not been sued for any alleged violation of the Robinson-Patman Act. Instead, Mobil has urged a hypothetical injury as a defense to its improper establishment of classes of purchasers. In this regard, the case is vastly different from the many cases brought before this court urging immunity from the anti-trust laws.[18]

The FEA said its:

> [C]lass of purchaser requirements are intended to be and should be construed as being consistent with requirements of the Robinson-Patman Act.

40 Fed. Reg. 10.655 at 10,658.

---

18 See annotation at 45 L.Ed.2d 841.

Thus, the FEA said that, in making class of purchaser determinations, it "will take into account whether the differential in question falls into one of the categories that differential is justified under the Robinson-Patman Act." Id.

The FEA noted, however, that it would not accept the bold assertion that a discount was a competitive discount. The FEA said it:

> [W]ill look behind broad assertions that a particular differential was a "competitive" discount and will determine whether in fact the differential was extended to meet a competitive offer and, even if it was, whether it was equally justifiable on a cost basis. Where there is an equally strong cost justification for a "competitive" discount, FEA will require it to be continued.

Id.

The district court, accepting the guidance given by the agency particularly charged with establishing regulations controlling petroleum prices, looked at the stipulated facts presented to it. The district court determined that Typhoon and Mobil had stipulated to the existence of objective factors virtually identical to those used by the FEA in its factual Example 7. Again following the guidance of the FEA, the district court stated that those objective factors were "in and of themselves justifications" for the establishment of a separate class of purchaser for car washes such as Typhoon.

Thus the district court determined that Mobil was required to place Typhoon into a separate class of purchaser. Mobil's

argument that its conduct was controlled instead by the Robinson-Patman Act was rejected by the district court, on the grounds that the pervasive nature of the petroleum pricing regulations concerning maximum allowable selling prices preempted the Robinson-Patman Act, at least in that area.

The district court cited and relied upon the only two cases to have dealt with the question of the preemption of the antitrust statutes by the EPAA and the petroleum pricing regulations. In Inter City Oil Co. v. Murphy Oil Corp., 1 Energy Mgmt. (CCH) ¶ 9722 (D.Minn. June 25, 1976), a fuel oil distributor had been sued for anticompetitive pricing behavior. It defended the suit on the basis that it

could not charge higher prices due the maximum allowable price restrictions of the FEA regulations. The Inter City case is thus very similar to the hypothetical fears of Mobil -- it involved a seller of petroleum products charged with anticompetitive behavior based on its compliance with the petroleum pricing regulations.

The Inter City case was decided by Senior District Court Judge Earl R. Larson, who was subsequently appointed to TECA by Chief Justice Warren E. Burger. Judge Larson conducted an exhaustive examination of this Court's rulings concerning immunity from antitrust scrutiny.[19] The court noted:

---

19 Inter City Oil Co., ¶ 9722 at pp. 9785-9787; App. A-160.

> When specific conduct is pervasively regulated and when that regulation is supported by criminal, civil and administrative sanctions, the necessity for implying an antitrust immunity is clear. Failure to price above the FEA maximums is the product of "regulatory coercion" and not "business judgment." Otter Tail Power [Co. v. United States], 410 U.S. [366 (1973)] at 374. Maximum pricing is a matter "directly related to the [FEA's] responsibilities," and to permit "maintenance of an antitrust action [for these matters] . . . poses a substantial danger that [defendant] would be subjected to duplicative and inconsistent standards." [U.S. v. National Association of Securities Dealers, 422 U.S. 694 (1975)] at 735.

Id. at p. 9790.

The district court went on to decide that in the area of petroleum pricing, this Court's precedents of Gordon, supra, NASD, supra, and Ottertail Power, supra, directed

that antitrust scrutiny be preempted. Id. at 9795.

The second case was also decided by Senior District Judge, Earl R. Larson. In Evanson v. Union Oil Corp., [1974-1980 Transfer Binder] Energy Mgmt. (CCH) ¶ 26,158 (D.Minn. July 31, 1979), the court was faced with a refiner taking the precise position as has Mobil; namely that its violations of the maximum allowable selling price regulations were excused by the conjured need to comply with the Robinson-Patman Act. Judge Larson rejected Union Oil's attempted defense.

In an earlier Evanson opinion, Judge Larson said:

> Although it is clear that the FEA has incorporated Robinson-Patman Act principles in Ruling 1975-2, it seems apparent that this incorporation was the product of

> administrative discretion and was not required by law. The FEA's concern in Ruling 1975-2 was to effectuate ". . . the general goal that purchasers for which all practical purposes are similarly situated should be grouped in the same class purchaser." This is, preeminently, a regulatory goal; and the FEA specifically requested that purchases or sellers which found that the application of Ruling 1975-2 (with its incorporation of Robinson-Patman Act concepts) threatened achievement of this regulatory goal. . ." . . . promptly applied to the FEA for an exception from the class of purchaser rule. Id. The Court cannot assume that the Robinson-Patman Act applies to this case in literal terms.

[Transfer Binder 1974-80 Court Decisions] Energy Mgmt. (CCH) § 26,056 at pp. 26,455-56 (Footnote and citations omitted).

TECA, in its decision, rejected both cases without engaging in any meaningful analysis of either case or the Supreme Court precedents upon which they were

based. TECA claimed that the Inter City decision was limited to the "discrete and particularized realm" in which it was decided.[20] That discrete and particularized realm however was the realm of maximum allowable selling prices under the petroleum pricing regulations. That is precisely the area in question in this case.

TECA ignored the Evanson decision by claiming it was unsupported by Ruling 1975-2, the legislative history of the EPAA, or the Inter City decision. As previously discussed, Ruling 1975-2 certainly supports a claim for limited antitrust immunity. TECA quoted one portion of the legislative

---

20 4 Energy Mgmt. ¶ 26,542 at p. 26,477; App. A-1.

history dealing with the preservation of competition in the petroleum industry, but overlooked another portion of the legislative history which said:

> The listing of objectives in successive paragraphs (A) through (I) in section 4(b)(1) is not intended to establish any order of priority. There [sic] are collective goals, and the conferees have not attempted to discern an order of precedence or value one against another. It is fully recognized that, in some instances, it may be impossible to satisfy one objective without sacrificing the accomplishment of another.

S. Rep. 628, 93rd Cong. 2d Sess., 1973 U.S. Code Cong. & Ad. News at 2688.

The Congress further noted, in explaining why price regulations were to be continued:

> By requiring that both allocations and prices be covered in the regulation required to be promulgated and implemented under Section 4(a), Congress intends to force the Administration to rationalize and harmonize the

> objective of equitable allocation of fuels with the objectives of the Economic Stabilization Act. The committee wishes to emphasize that the pricing controls called for in this legislation may, in those circumstances where pricing controls established pursuant to other federal authority are consistent with the requirements and objectives of this Act, merely confirm those controls and the regulation to be promulgated under authority of Section 4 of this Act. It is expressly contemplated, for example, that the price controls established by Phase IV under authority of the Economic Stabilization Act would continue in effect unless and until required to be modified by the price regulation required to carry out the purposes of this Act.

Id. at 2702.

It is thus clear that TECA's rejection of the careful analysis set forth in Inter City and Evanson was incorrect. TECA ignored the clear language and intent of the FEA by stating that Typhoon had failed

to prove its discount was cost justified to the literal standard required by the Robinson-Patman Act.

A requirement of literal compliance with the Robinson-Patman Act would preclude any purchaser from sustaining a cost-justified discount. This is so because the cost justification defense has been interpreted so rigorously that it has been characterized as "largely illusory in practice." See Rowe, Price Discrimination Under the Robinson-Patman Act, 296-312. Every major study of the cost justification defense reaffirms this fact. The latest study done by the Department of Justice concluded the following:

> The difficulty of complying with the FTC's rigid cost justification requirements, plus the expense of collecting data through methods foreign to most accountants and

> businessmen, make the barriers to practical utilization of the defense almost insurmountable.

U.S. Department of Justice, Report on the Robinson-Patman Act, 22 (1977).

TECA was wrong in stating that Typhoon must prove cost justification to the literal standards of the Robinson-Patman Act. The FEA, the agency charged with regulating petroleum prices, never incorporated each nuance and detail of the Robinson-Patman Act and its defenses. The agency very specifically referred to the use of objective, not subjective factors in establishing whether a price distinction was customary. In this regard, TECA has improperly substituted its judgment for that of the agency.[21]

---

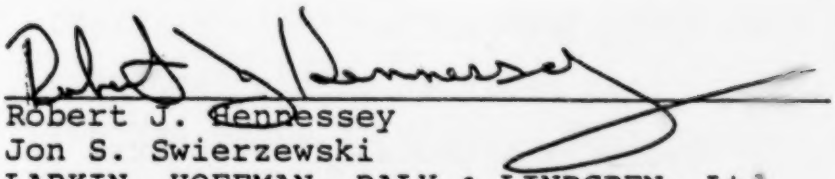
21 TECA itself has noted many times that "deference must be accorded to FEA's

CONCLUSION

For the above reasons, Typhoon requests that this court grant certiorari to review the July 2, 1985 decision of the Temporary Emergency Court of Appeals of the United States.

(Footnote 21 continued)
expertise in interpreting its own regulation." Consumers Union of the United States, Inc. v. Sawhill, 525 F.2d 1068, 1076 n.13 (Temp.Emer.Ct.App. 1975); see also Bulzan v. Atlantic Richfield Co., 620 F.2d 278, 284 (Temp.Emer.Ct.App. 1980); General Crude Oil Co. v. Department of Energy, 585 F.2d 508, 515 (Temp.Emer.Ct. App. 1978), cert. denied, 440 U.S. 912 (1979); Marathon Oil Co. v. FEA, 547 F.2d 1140, 1146 n.16 and cases there cited (Temp.Emer.Ct.App. 1976), cert. denied, 430 U.S. 983 (1977); Cities Service Co. v. F.E.A., 529 F.2d 1016, 1023 n.10 (Temp.Emer.Ct.App. 1975), cert. denied, 426 U.S. 947 (1976); Pacific Cost Meat Jobbers Association, Inc. v. Cost of Living Council, 481 F.2d 1388, 1392 (Temp.Emer.Ct.App. 1973).

Respectfully submitted,



Robert J. Hennessey
Jon S. Swierzewski
LARKIN, HOFFMAN, DALY & LINDGREN, Ltd.
Attorneys for Petitioner
1500 Northwestern Financial Center
7900 Xerxes Avenue South
Bloomington, Minnesota 55431
(612) 835-3800

JSS:AP1

APPENDIX

INDEX TO APPENDIX

	Page
July 2, 1985 Opinion of the Temporary Emergency Court of Appeals	A-1
Memorandum and Order of Judge Harry H. MacLaughlin, October 28, 1983	A-9
Memorandum and Order of Judge Harry H. MacLaughlin, (July 13, 1984)	A-56
Judgment (August 29, 1984)	A-84
Order Denying Petition for Rehearing En Banc (August 7, 1985)	A-87
Statutes:	
Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §754	A-89
Economic Stabilization Act of 1970, 84 Stat. 799 (1970)	A-103
Robinson-Patman Act, 15 U.S.C. §13 . .	A-118
Regulations:	
10 C.F.R. §212.31 (1974 and 1975) . . .	(omitted)
Rulings:	
Cost of Living Council Ruling 1973-19, 38 Fed. Reg. 34,312 (1973)	(omitted)

Federal Energy Office Ruling 1974-17,
39 Fed. Reg. 21,043 (1974) . . . . . (omitted)

Federal Energy Office Ruling 1974-18,
39 Fed. Reg. 21,043 (1974) . . . . . (omitted)

Federal Energy Administration
Ruling 1975-2, 40 Fed. Reg.
10,655 (1975) A-129

Other Authorities:

Evanson v. Union Oil Co., [Transfer
Binder 1974-80 Court Decisions]
Energy Mgmt. (CCH) ¶26,056 (D.Minn.
August 5, 1976) . . . . . (omitted)

Evanson v. Union Oil Co., [Transfer
Binder 1974-80 Court Decisions]
Energy Mgmt. (CCH) ¶26,158 (D.Minn
July 31, 1979) . . . . . (omitted)

Inter City Oil Co. v. Murphy Oil
Corp., 1 Energy Mgmt. (CCH) ¶9722
(D.Minn. June 25, 1976) . . . . . (omitted)

Typhoon Car Wash, Inc. v. Mobil Oil Corporation, ___ F.2d ___, Energy Mgmt. (CCH) ¶ 26,542 (Temp. Emer. Ct. App., Dkt. No. 8-17, July 2, 1985).

Before Jameson, Grant, and Peck, Judges

FACTS AND ARGUMENTS

Prior to the 1979 oil shortage, Mobil Oil supplied gasoline to Typhoon Car Wash's three outlets under a 1977 agreement that included a competitive discount that had been met by Mobil in response to a competing supplier's offer. With the advent of the Iranian-induced oil crisis, Mobil found that petroleum economics no longer justified the discount and, in keeping with its contract with Typhoon, cancelled it. Typhoon then sued, alleging that because its sales volumes were greater

than those of other retail outlets supplied by Mobil, it should be classified in a separate purchaser group that was entitled to the discount. A federal district court in Minnesota agreed, and Mobil appealed.

TECA OPINION

Reversing, the special appeals court ruled that any antitrust considerations stemming from unequal treatment of retail gasoline stations were preempted by the Allocation Act, that there were no cost justifications in the initial award of a competitive discount to the car wash, that there was no reason to give favored status to a car wash gasoline purchaser vis-a-vis other large retail purchasers, and that competitive discounts could legally be terminated during the control period under DOE regulations.

The text of the TECA opinion follows:

Grant, Judge. Defendant-appellant, Mobil Oil Corporation, [hereinafter referred to as Mobil], appeals from the district court's granting of summary judgment to plaintiff-appellee, Typhoon Car Wash, Inc., [hereinafter referred to as Typhoon]. The district court awarded Typhoon $80,493 on its claims alleging that Mobil placed Typhoon in an improper class of purchaser and overcharged Typhoon for gasoline in violation of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760th (1976); $16,424.25 on Typhoon's claim alleging that Mobil violated the Emergency Petroleum Allocation Act of 1973 by discontinuing its practice of accepting the Master Charge and Visa

credit card invoices of Typhoon's patrons as payment for gasoline purchased by Typhoon from Mobil; $45,000 for Typhoon's attorney's fees, and $24,466.20 for prejudgment interest. Mobil does not appeal the district court's entry of judgment on the credit and invoice issue. Because we find that Mobil did not place Typhoon in an improper class of purchaser, this Court reverses the district court's order and vacates the award to Typhoon based upon the improper classification as well as the awards of attorney's fees and prejudgment interest.

FACTS

The parties stipulated to the following facts:

Typhoon owns and operates three tunnel-type car washes in the Minneapolis-St. Paul, Minnesota area. Typhoon sells gasoline and car washes at each of its locations. Prior to 1977, Typhoon purchased for resale Sunray DX gasoline for which Typhoon received a discount of 2.65 cents per gallon. In early 1977, Typhoon learned that Sunray DX would not renew its contract to supply gasoline to one of Typhoon's car washes. Whereupon Typhoon began searching for a new supplier for all three of its car washes and approached Amoco, Mobil and Union 76.

Typhoon dismissed Amoco as a potential supplier because Amoco refused to service one of Typhoon's car washes and because Typhoon found the discount offered by Amoco

to be too low. Typhoon pursued negotiations with Mobil and Union 76 seeking the highest competitive discount that it could get. Because Union 76 had withdrawn discounts from its customers when gasoline supplies had become limited in 1973 and 1974, Typhoon decided to solicit Mobil as its supplier of gasoline.

Before Mobil would grant Typhoon a competitive discount, Mobil required that Typhoon obtain a competing offer from another gasoline supplier. Typhoon obtained such an offer and informed Mobil by letter. Mobil and Typhoon then entered into five-year contracts for each of Typhoon's locations. The contracts provided that Typhoon would receive a competitive allowance of 2.25 cents per

gallon off the regular dealer tankwagon price, that Mobil could reduce or withdraw the competitive allowance at any time upon thirty days written notice, and that Typhoon could terminate the agreement upon thirty days notice for a reduction or withdrawal of the allowance. Mobil began supplying Typhoon with gasoline from its St. Paul terminal in October 1977.

For pricing purposes, Mobil classified its customers at each of its supply terminals into three levels of purchasers: retail, wholesale distributors and commercial accounts. The retail level of purchaser included those dealers who owned their own stations or leased their stations from someone other than Mobil, and also, those dealers who leased their stations

from Mobil. Mobil referred to the former group as N dealers and to the latter group as OG&L dealers. Typhoon became an N Dealer in the retail level class of purchaser. As of May 15, 1973, the date upon which the regulations required as supplier to maintain its purchaser structure, 10 C.F.R. § 212.83 (1980), Mobil supplied 111 retail level purchasers with gasoline from its St. Paul terminal. Of those retail purchasers, seventy-nine operated as OG&L dealers and thirty-two as N dealers. Of the thirty-two N dealers, five owned and operated tunnel-type car washes, including Typhoon's three stations. All five N dealers who owned tunnel-type car washes received competitive allowances ranging from 2.25 to 3.0 cents per gallon

as of May 15, 1973. Nineteen of the twenty-seven N service station dealers received competitive allowances ranging from 0.5 to 2.5 cents per gallon as of May 15, 1973. None of the seventy-nine OG&L dealers received competitive allowances. Mobil made no class of purchaser gradations among its retail level customers. Up to, and including, May 15, 1973, car wash dealers supplied by Mobil's St. Paul terminal sold significantly higher average annual volumes of gasoline than did non-car wash dealers.

During the summer of 1979, shortages developed in oil supplies and dramatically changed the competitive situation. Mobil decided to reduce Typhoon's competitive allowance to 1.75 cents per gallon on August 1, 1979, and, on October 1, 1979,

withdrew the competitive allowance altogether.

In April 1980, Typhoon brought this action alleging that Mobil had overcharged it for gasoline by placing it in an improper class of purchaser in violation of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751.760h. After discovery, the parties stipulated to the facts and submitted this matter to a United States magistrate on cross-motions for summary judgment.

In his first report and recommendation, the magistrate found that Mobil had placed Typhoon in an incorrect class of purchaser and, therefore, that Mobil failed to preserve the customary price differential that existed between N tunnel-type car

washes and other retail level customers. The magistrate relied upon Ruling 1975-2, 40 Fed. Reg. 10,655 (1975). Example 7 of the Ruling requires car wash dealers who sell higher volumes of gasoline than non-car wash dealers, to be placed in a distinct class of purchase "because the higher volumes and the substantially greater investments in thier (sic) stations of the car wash dealers are in themselves justifications under the Robinson-Patman Act for treating the car wash dealers differently." Id. at 10,660.[1]

The magistrate recommended that the district court grant summary judgment in favor of Typhoon on those counts alleging

---

1 Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1976).

the improper classification. After a de novo determination of that recommendation, the district court accepted it and granted summary judgment accordingly. We reverse.

STATUTORY BACKGROUND

Congress passed the Emergency Petroleum Allocation Act of 1973 in reaction to the 1973 Arab oil embargo which threatened the United States "with the possibility of drastic shortages in crude oil supplies and spiralling of petroleum costs." H.R. Rep. No. 340, 94th Cong., 1st Sess. 51, reprinted in 1975 U.S. Code Cong. & Ad. News 1762, 1813. The bill focused "on the short term objectives of seeing to it that during times of shortage our priority [petroleum] needs are net and that whatever

limited supplies we have are equitably distributed throughout the nation to meet regional needs and preserve competition in the marketplace." H.R. Rep. No. 531, 93d Cong., 1st Sess. reprinted in 1973 U.S. Code Cong. & Ad. News 2582, 2583. The Act imposed upon the President the duty to regulate the amounts and price at which crude oil, residual fuel oil, and refined petroleum products would be allocated. 15 U.S.C. § 753(a). The President delegated this authority to the Federal Energy Administration [hereinafter referred to as FEA].[2]

---

2 The Federal Energy Administration Act of 1974, Pub. L. No. 93-275, 88 Stat. 96, implemented by Exec. Order No. 11,790, 39 Fed. Reg. 23,185 (1974), abolished the Federal Energy Office and vested all authority delegated to the President by the Emergency Petroleum

(Footnote 2 Continued on Next Page

Exec. Order No. 11,790, 39 Fed. Reg. 23,185 (1974).

Pursuant to its authority, the FEA issued Part 212 -- Mandatory Petroleum Pricing Regulations, 10 C.F.R. §§ 212.1-.188 (1980).[3]

The Regulations prohibited a refiner from "charg[ing] to any class of purchaser a price for a covered product in excess of the maximum allowable price. . . ." Id. at § 212.83(a). Maximum allowable price meant

---

(Footnote 2 Continued from Previous Page)
Allocation Act in the newly established FEA. The Department of Energy Organization Act, Publ. L. No. 95-91, 91 Stat. 565 (1977), implemented by Exec. Order No. 12,009, 42 Fed. Reg. 46267 (1977), gave the Department of Energy the responsibility for enforcing the pricing and allocating authority. Because the FEA promulgated the regulations before the Court in the instant case, this Court will refer to the agency responsible for construing
(Footnote 2 Continued on Next Page

> the weighted average price at which the covered product was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, computed in accordance with the provisions of § 212.83(a), plus increased product costs and increased nonproduct costs incurred between the month of measurement and the month of May 1973.

Id. at § 212.82. A class of purchaser consisted of "purchasers to whom a person ha[d] charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers and other purchasers." Id. at

---

(Footnote 2 Continued from Previous Page) and enforcing the price controls as the FEA.

3 Exec. Order No. 12,287. 46 Fed. Reg. 9,909 (1981) exempted crude oil and refined petroleum products from price and allocation regulations. The Economic Regulatory Administration implemented the decontrol order. 46 Fed. Reg. 20,508 (1981).

212.31. Customary price differentials "include[d] a price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery." Id.

To clarify the application of the class of purchaser concept, the FEA promulgated Ruling 1975-2, 40 Fed. Reg. 10,655. The ruling discussed the concept's general principles and then illustrated those principals with factual examples. The question in the instant case revolves around Example 7.[4]

---

4 Example 7: On May 15, 1973, Firm G charged most of its 500 branded dealers a dealers tankwagon price of 15 cents per gallon for motor gasoline.
(Footnote 4 Continued on Next Page

(Footnote 4 Continued from Previous Page)
Included in those dealers were 25 which sold gasoline in connection with car wash operations which they owned. Of the 25 car wash dealers, Firm G had given 20 of them various discounts, determined on an individual basis, to meet equally low offers of competitors. Similar competitive discounts were given to four of Firm G's non-car wash dealers. All of the 25 car wash dealers sold approximately equal volumes of gasoline, and all of them had substantially greater capital investments in their stations and sold higher volumes of gasoline than the rest of Firm G's dealers.

The application of the class of purchaser doctrine here should be similar to its application in Example 5. Firm G is required to treat all 25 of the car wash dealers as being in the same class of purchaser and in a distinct class of purchaser from its 475 non-car wash dealers. This is so because the higher volumes and the substantially greater investments in their (sic) stations of the car wash dealers are in themselves justifications under the Robinson-Patman Act for treating the car wash dealers differently. Firm G is not required, however, to maintain separate classes of purchaser for those car wash

(Footnote 4 Continued on Next Page

ISSUE

This Court need address only one issue in its disposition of this appeal:

> Whether the FEA's regulations required Mobil to place Typhoon into a class of purchaser consisting of N tunnel-type car washes purchasing gasoline from Mobil's St. Paul, Minnesota, terminal?

The district court determined that Typhoon's car washes fell within the objective factors set forth in

---

(Footnote 4 Continued from Previous Page)
dealers that had competitive discounts in effect on May 15, 1973, and those car wash dealers that did not, since those car wash dealers that had discounts in effect are distinguishable from other car wash dealers only in that they had received lower offers from a competitor of Firm G. Similarly, with the non-car wash class, Firm G need not maintain a separate class of purchaser for four non-car wash dealers that received discounts given only to meet competition. The May 15, 1973, lawful selling price
(Footnote 4 Continued on Next Page

Ruling 1975-2, ex. 7 and concluded that Mobil had placed Typhoon in an improper class of purchaser, "because the instant case also involve[d] a plaintiff selling higher volumes, and making a substantially greater investment." Mobil Oil Corporation v. Typhoon Car Wash, Inc., No. 4-80-257 at 18 (D. Minn. Oct. 28, 1983) (memorandum and order finding violation of Emergency Petroleum Allocation Act of 1973). The

---

(Footnote 4 Continued from Previous Page)
component of Firm G's base price for the non-car wash class is therefore the weighted average of 15 cents per gallon for 471 dealers and the lower May 15, 1973, prices afforded to four dealers; the May 15, 1973, lawful selling price component of its base price for the car wash class of purchaser is the weighted average of 15 cents per gallon for five dealers and the lower May 15, 1973, prices afforded to the other 20 members of the class.

40 Fed. Reg. at 10,660.

district court rejected Mobil's Robinson-Patman Act competitive discount defense and reasoned that a court need not concern itself with the antitrust laws once it found that example 7's factors had been met because the later enacted energy laws preempted the antitrust laws. The district court relied upon Evanson v. Union Oil, [1974-1980 Transfer Binder] Energy Mgmt. (CCH) § 26,158 (D. Minn. July 31, 1979) which states in pertinent part:

> The nub of the matter is that if Union complied with ESA, EPAA, the regulations and Ruling 1975-2, it most likely did not violate the Robinson-Patman Act. If Union complied with ESA, EPAA, the rgulations (sic) and Ruling 1975-2 but violated the Robinson-Patman Act in so acting, it does not incur antitrust liability since the later enacted regulatory scheme is pre-emptive of the antitrust laws in that situation. Therefore the antitrust laws are not implicated in this lawsuit. . . .

Id. at 27,403. Such a broad application of the antitrust pre-emption in Evanson has no basis in the language of the regulation, in the legislative history or in the case itself.

First, Ruling 1975-2 provides that

> FEA's class of purchaser requirements are intended to be and should be construed as being consistent with requirements of the Robinson-Patman Act. Thus, in determining whether a price differential in effect on May 15, 1973, was a customary differential which shall be maintained with respect to a class of purchaser, FEA will take into account whether the differential in question falls into one of the categories of differentials justified under the Robinson-Patman Act.

40 Fed. Reg. at 10,658. The categories of differentials to which the regulation refers consist of the cost justification defense, 15 U.S.C. § 13(a), and the meeting

the competition, or the competitive discount, defense, 15 U.S.C. § 13(b). The language of the ruling, and its incorporation of the Robinson-Patman Act defenses, both militate against the pre-emption of the antitrust laws.

Second, the legislative history of the Emergency Petroleum Allocation Act of 1973 indicates that one of its short term objectives was to equitably distribute petroleum supplies to "preserve competition in the market place." H.R. Rep. No. 531, supra, 1973 U.S. Code Cong. & Ad. News at 2583. Thus, the Act seeks the same goal as the antitrust laws, that is, the preservation of competition, and its legislative history provides no basis for a broad pre-emption of the antitrust laws.

Finally, in holding that the antitrust laws were pre-empted in the particular case before it, the Evanson court found Inter City Oil Co. v. Murphy Oil Corp., 1 Energy Mgmt. (CCH) § 9722 (D. Minn. June 25, 1976) to be analogous because the Inter City Oil court had confronted precisely the same situation. See Evanson, [1974-1980 Transfer Binder] Energy Mgmt. (CCH) at 27,403. In addressing the applicability of the antitrust laws to a supplier of fuel oil who was charging the maximum amount allowed under FEA regulations, the Inter City Oil court held that "[i]n this discrete and particularized realm, antitrust immunity is preempted." Inter City Oil, 1 Energy Mgmt. (CCH) at 9795 (emphasis added). The court went on to

note that "insofar as the proper functioning of the regulations presupposes continued competition, antitrust scrutiny, rather than antitrust immunity, may be necessary to make the Act work." Id.

In addressing the applicability of the antitrust laws to the case now before us, we note that "[t]he antitrust laws represent a 'fundamental national economic policy.'" National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378, 388 (1981) (citations omitted). The legislature did not expressly pre-empt the antitrust laws when it enacted the Emergency Petroleum Allocation Act and the courts do not favor an implied repeal of the antitrust laws. See Id. at 388; Gordon v. New York Stock

Exchange, Inc., 422 U.S. 659, 682 (1975). A regulatory scheme may impliedly repeal the antitrust laws if there is an affirmative showing of the legislative intent to repeal, which has not been shown here, or if the regulatory scheme and the antitrust laws are irreconcilable. North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc., 740 F.2d 274, 280 (4th Cir. 1984), cert. denied, __ U.S. __, 53 U.S.L.W. 3702 (U.S. April 2, 1985). Irreconcilability means plain or clear repugnancy. "Where plain repugnancy does exist, the antitrust laws may be held repealed only to the minimum extent necessary to resolve the repugnancy, ... 'The guiding principle [is] reconciliation of the two statutory

schemes,". . . rather than 'to oust completely the antitrust laws and supplant them' with the regulatory scheme. . . . " Id. at 284 (citations omitted); National Gerimedical Hospital, 452 U.S. at 389. If co-existence is possible, the courts have a duty to regard each statute as effective. North Carolina ex rel. Edmisten, 4[illegible] F.2d at 284. Because no clear repugnancy exists between the antitrust laws and Ruling 1975-2 and because Ruling 1975-2 expressly incorporated the Robinson-Patman Act, the district court here improperly disregarded the antitrust laws in reaching its decision. The district court should have treated each statute as effective. We do so now.

In the instant case, Mobil offered Typhoon a discount of 2.25 cents in the face of a written competing offer from Union 76. When the competitive situation disappeared, Mobil withdrew the allowances.[5]

Typhoon claims, and the district court found, that Typhoon, as a high-volume purchaser who had made a substantially greater investment in its stations, belonged in a class of purchaser entitled

---

5 The issue of law is clear. If the discounts were competitive allowances, Mobil was free to terminate them at any time. If the discounts were cost-justified customary price differentials, the price regulations forbid Mobil to withdraw them. The burden falls upon Typhoon to show that the discounts it received from Mobil were cost-justified. Reynolds Industries, Inc. v. Mobil Oil Corporation, 741 F.2d 1385 (Temp. Emer. Ct. App. 1984); Mr. Magic Car Wash, Inc. v. Department of Energy, 596 F.2d 1023 (Temp. Emer. Ct. App. 1978).

to receive the discount that it would have received from Mobil on May 15, 1973, because the discount which Typhoon was receiving was cost justified. Typhoon maintains the Ruling 1975-2 supports this position and cites the following language from the Ruling:

> It is important to point out, however, that certain discounts may have been "competitive discounts" in form, having ostensibly been granted to meet a lower offer and with an affidavit having been executed by the buyer to that effect, but may nevertheless also be cost justified under the Robinson-Patman Act. . . .

Thus, as a general rule the FEA will not require classes of purchaser to be established to maintain price differentials which on May 15, 1973, were in effect only to meet an equally low offer of a

competitor. But the FEA will look behind broad assertions that a particular differential was a "competitive" discount and will determine whether in fact the differential was extended to meet a competitive offer and, even if it was, whether it was equally justifiable on a cost basis. Where there is an equally strong cost justification for a "competitive" discount, FEA will require it to be continued.

OR40 Fed. Reg. at 10,658.

Here, Typhoon presented evidence that the cost of building a typical tunnel-type car wash significantly exceeded the cost of building a non-car wash service station and evidence that the five N tunnel-type car washes sold a higher average annual volume

of gasoline that non-car wash service stations. The district court improperly concluded that this evidence met the requirements of Ruling 1975-2, ex. 7 and that the discount was cost justified, and thereupon granted summary judgment to Typhoon. However, such evidence does not suffice, as a matter of law, to show cost justification.

First, the cost of constructing, maintaining, or owning a service station is not to be considered in determining whether a discount is cost justified. See Pacific Service Stations Co. v. Mobil Oil Corporation, 636 F.2d 306, 309 (Temp. Emer. Ct. App. 1980) (citing Templeton's Service, Inc. v. Mobil Oil Corporation, 624 F.2d 1084 (Temp. Emer. Ct. App. 1980)). A cost

justified allowance means an allowance that reflects cost savings to a supplier due to "'differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .'" Ruling 1975-2, 40 Fed. Reg. at 10,658 (quoting Robinson-Patman Act. 15 U.S.C. § 13(a)). The additional costs associated with building a car wash (as opposed to a non-car wash service station) do not represent a cost saving to a supplier under the Robinson-Patman Act as incorporated by the regulations under the Emergency Petroleum Allocation Act.

Or Second, establishing a cost-justified class of purchaser based upon an average

annual volume of petroleum purchased by the car-wash group would create artificial disparities between smaller individual purchasers in that favored group and large purchasers who had no car wash. United States v. Borden Co., 370 U.S. 460, 469-70 (1962). Further, the Robinson-Patman Act requires that the party asserting cost justification based upon volume purchased must prove that the purchasers in the favored group placed larger individual orders than purchasers in the non-favored group, because a seller, in establishing purchasers groups, may not assume that customers who purchase large volume annually also place large individual orders throughout the year. Re Master Lock Company, 27 F.T.C. 982, 991-92 (1938); Re

H. C. Brill Company, Inc., 26 F.T.C. 666, 678 (1938). The evidence presented by Typhoon shows only that the five N tunnel-type car washes sold higher average annual volumes of gasoline that did non-car wash service stations. Such evidence does not suffice to establish cost justification under the Robinson-Patman Act as incorporated by the regulations under the Emergency Petroleum Allocation Act.

Finally, some of the N service station dealers here involved received competitive discounts which exceeded the discounts rreceived by some N tunnel-type car wash dealers. [6]

---

6 All five N tunnel-type car wash dealers received competitive allowances ranging from 2.25 to 3.0 cents per gallon as of May 15, 1973. Nineteen of the twenty-seven N car wash dealers received

(Footnote 6 Continued on Next Page

This fact further convinces us that the N tunnel-type car washes here involved do not constitute a separate class of purchaser.

CONCLUSION

Typhoon admits that it received competitive offers from other suppliers before entering into contracts with Mobil. Nothing exists to indicate that the letters evidencing those offers were shams. Any supplier would have found Typhoon to be an attractive customer and would have had ample competitive basis for extending the discount that Mobil extended. The evidence fails to show that the discounts here

---

(Footnote 6 Continued from Previous Page) competitive allowances ranging from 0.5 to 2.5 cents per gallon. See Facts, supra. p. 4.

extended by Mobil were cost justified under the Robinson-Patman Act as incorporated by the regulations under the Emergency Petroleum Allocation Act. This Court need not address the other issues raised by Typhoon.

The decision of the district court is REVERSED, its entry of judgment is VACATED and the c e is REMANDED for an entry of judgment consistent with this opinion.

JSS:AQ3

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Typhoon Car Wash, Inc., a Minnesota corporation,

Plaintiff, CIVIL 4-80-257

v. ORDER

Mobil Oil Corporation, a New York corporation,

Defendant.

This matter is before the Court on the parties' objections to the report and recommendation of the United States Magistrate. The Magistrate recommended that the Court adopt the parties' stipulated facts, enter summary judgment in plaintiff's favor on Counts I and II of its amended complaint, and deny the parties'

motion for summary judgment in all other respects. Based upon the Court's independent de novo determination of the Magistrate's report, findings and recommendations, the Court finds itself in substantial agreement with the Magistrate. However, the Court will not enter summary judgment on Counts I and II until the parties present additional evidence to the Magistrate, and the Magistrate submits a report and recommendation pursuant to this order.

FACTS

Plaintiff claims:

(1) defendant placed it in an incorrect class of purchaser, and thus, overcharged it for gasoline purchases in violation of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. § 1904, as incorporated by the Emergency Petroleum Allocation Act of

1973 (EPAA), 15 U.S.C. § 751, et seq. (Count I, amended complaint);

(2) defendant placed it in an incorrect class of purchaser, and thus, plaintiff suffered a legal wrong under the ESA and EPAA (Count II, amended complaint);

(3) defendant violated the ESA and EPAA by discontinuing its practice of accepting the Master Charge and Visa credit card invoices of plaintiff's patrons as payment for gasoline purchased by plaintiff from defendant. The plaintiff claims that the discontinuance amounts to the imposition of more stringent credit terms without the required reduction of its gasoline prices, and that it damaged plaintiff to the extent that plaintiff was forced to enter into a more costly independent relationship with Master Charge and Visa (Count III, amended complaint);

(4) plaintiff entered into the 1977 contracts with defendant in detrimental reliance on a misrepresentation made by

> defendant's representative regarding the gasoline price discounts defendant afforded its retailers during the 1973 Arab Oil Embargo (Count IV, amended complaint).

Plaintiff moves for summary judgment on the first three claims while defendant seeks summary judgment on all four claims.

The Court adopts the parties stipulated facts, and also the Magistrate's summary of those stipulated facts. The following stipulated facts include important details about defendant's normal operating procedures that are helpful in understanding the transactions giving rise to this lawsuit:

> Typhoon is a Minnesota corporation that owns and operates three tunnel-type car wash gasoline stations in the metropolitan area of Minneapolis, Minnesota. Typhoon sells gasoline as a retailer to the motoring public at each car wash location. Mobil is

a New York corporation that sells gasoline and petroleum products to retail dealers for resale to the public. In 1977 Mobil agreed to supply gasoline to Typhoon's three service stations for a five year period. The contract prices included a discount of 2.25 cents per gallon from the standard price, the dealer tankwagon price, that Mobil charged its retail dealers. Mobil also allowed Typhoon to participate in a retail credit program whereby Mobil accepted as Typhoon's payment the Master Charge or Visa credit card invoices of Typhoon's customers.

Prior to its contracts with Mobil, Typhoon purchased its gasoline from DX Sunray ("DX") at each car wash location from 1967 to 1977. Typhoon received a discount from DX throughout that period of 2.65 cents per gallon. However, one of Typhoon's three contracts with DX was to expire in 1977 and DX did not intend to renew it. Typhoon sought a replacement supplier of gasoline for that location. The other two car wash locations were under separate contracts with DX that ran until December 1, 1981, and January 1, 1982.

In searching for a replacement supplier, Leon Schmieg, president

of Typhoon, understood that Typhoon had greater bargaining power to negotiate a higher "competitive allowance" or discount on its gasoline purchases from an oil company if Typhoon could offer the company three purchasing gas stations rather than just one. Schmieg wanted the highest discount possible because it would reduce Typhoon's costs. In the past, Typhoon used the allowance afforded by DX to lower its retail price of gasoline to attract motorists into its business.

Schmieg contacted Mobil and met with its representatives in late March of 1977 to discuss Typhoon's interest in securing Mobil as a replacement supplier of gasoline. During the negotiations with Mobil, Typhoon also negotiated with Mobil's competitors, Amoco and Union 76. Schmieg dismissed Amoco as a potential supplier when the company would only supply gasoline to one of the three car wash operations and offered an allowance of only 1.5 cents per gallon. Typhoon was more serious in its talks with Union 76, but Schmieg was aware that Union had reduced and withdrawn its discounts to certain retail dealers during the period of the

Arab Oil Embargo. In contrast, DX had not reduced Typhoon's discount during that period. It was Schmieg's belief that Mobil, like DX, had not reduced or eliminated its price allowances during the embargo. Schmieg testified at a deposition in this case that his belief was based on statements made to him by Al Larson, a Mobil sales representative, during the 1977 negotiations with Mobil. Larson testified at a deposition that he either did not make or could not recall having made such a representation. It is undisputed that Mobil did reduce and withdraw the discounts during the embargo.

Before granting Typhoon an allowance, Mobil required Typhoon to obtain a competing offer from a Mobil competitor. Specifically, Mobil conditioned its offer on Typhoon's verification that the existing competitive conditions justified such an allowance. Typhoon was required to give Mobil the name of another oil company competing for Typhoon's business, the amount of any allowance offered and to alert Mobil of any change in the competitive conditions. Mobil also reserved the right to reopen and renegotiate the amount of the

allowance. Typhoon received an offer from Union 76 of a discount of 2.5 cents per gallon.

Typhoon informed Mobil by letter of the competing offer. In response, Mobil offered Typhoon a price discount of 2.25 cents per gallon with the provision that the discount could be reduced or withdrawn on 30 day's [sic] written notice. In the event of a reduction or elimination, Typhoon had the right to terminate the contract between the parties. Typhoon accepted Mobil's offer on October 1, 1977, to supply gasoline to Typhoon's three car wash operations. Schmieg's decision to accept Mobil's offer on Typhoon's behalf was based primarily on the amount of the allowance, although he also relied on his belief that Mobil had refused to reduce or withdraw price allowances of retail dealers during the Arab Oil Embargo. Schmieg testified at his deposition that the Mobil offer probably would not have been acceptable if the allowance had been any lower. Mobil has supplied Typhoon with gasoline from Mobil's terminal in St. Paul, Minnesota, since October 1, 1977.

> During the summer of 1979, gasoline shortages developed in the Minneapolis metropolitan area due to the hostage crisis in Iran and a truckers' strike. Mobil reduced and finally eliminated Typhoon's price discounts and credit program, effective October 1, 1979. At the same time, Mobil readjusted its gasoline prices according to the price reduction formula set forth in the Proposed Remedial Order in In Re Getty Oil Company, United States Economic Regulation Administration, Pacific District-Office of Special Council, Case No. 680R00097, July 20, 1978. Typhoon then entered into an independent relationship with Master Charge and Visa at an additional cost to Typhoon of $19,903.78 for the period October 1979 to January 28, 1981.

Magistrate's Report and Recommendation at 2-6.

Defendant classified its customers into three levels of purchasers -- retail, wholesale distributors, and commercial accounts. Plaintiff sold gasoline directly to the public and accordingly was

classified by defendant as a retail level purchaser. This classification included all service stations, car washes and other dealers who sold gasoline at retail to the consuming public. Furthermore, defendant referred to dealers who operated on property not owned by defendant as N dealers, and those who operated on property owned by defendant as OG&L dealers. Since plaintiff owned its own property, it was classified by defendant as an N dealer.

The regulations promulgated by the Federal Energy Office (FEO), and later by the Federal Energy Administration (FEA), required a seller to maintain its purchaser structure, in terms of both petroleum allocation and pricing as it existed on May 15, 1973. Hence, statistics about

defendant's operations as of May 15, 1973 are crucial in this case.

Defendant supplied 111 retail level purchasers with gasoline from its St. Paul terminal as of May 15, 1973. Of those retail purchasers, 32 were N dealers, and 79 were OG&L dealers. In the absence of a "competitive allowance,"[1] defendant charged the dealer tank wagon price (regular price) to all retail level purchasers who bought gasoline from its St. Paul terminal. Defendant did not establish a separate class of purchasers for N tunnel-type car washes. All car washes,

---

1 In certain instances defendant granted a dealer a "competitive allowance" of varying amounts up to a few cents per gallon. The effect of a "competitive allowance" is to reduce the price per gallon that the dealer pays defendant for gasoline.

including plaintiff, were put into a class of purchasers consisting of all dealers who sold gasoline at retail to the consuming public.

Five out of five of the N tunnel-type car washes purchasing gasoline from defendant's St. Paul terminal were receiving a "competitive allowance" of between 2.25 and 3.0 cents per gallon as of May 15, 1973; 19 of the 27 N service stations purchasing gasoline from defendant's St. Paul terminal were receiving a "competitive allowance" of between 1/2 cent and 2.5 cents per gallon and none of the 79 OG&L dealers purchasing gasoline from defendant's St. Paul terminal were receiving a "competitive allowance." Up to and including May 15, 1973, the

volume of gasoline sold by car wash service stations had generally been significantly higher than the volume sold by non-car wash service stations. Also, the cost of building a typical tunnel-type car wash service station in the Minneapolis/St. Paul, Minnesota, metropolitan area was significantly higher than the cost of building a typical non-car wash service station due to the larger building and additional equipment necessary to operate a tunnel-type car wash.

The Magistrate divided his report and recommendation into three parts -- Gasoline Overcharging (Counts I and II of the amended complaint), Discontinuance of Credit Card Program (Count III of the amended complaint), and Fraud (Count IV of

the amended complaint). The plaintiff has objected to the Magistrate's report and recommendation by asserting that Count III is ripe for summary judgment. In addition, plaintiff seeks prejudgment interest, treble damages, and attorneys' fees and costs with respect to Count I. These claims were not presented to the Magistrate. On the other hand, defendant objects to the Magistrate's conclusion that the plaintiff is entitled to summary judgment on Counts I and II. However, the defendant agrees with the plaintiff that Count III of the amended complaint is ripe for summary judgment and asks that summary judgment be granted in its favor. This memorandum will be divided as the Magistrate's report and recommendation is

divided except there will be an additional section discussing plaintiff's claim for prejudgment interest, treble damages, and attorneys' fees and costs with respect to Count I of the amended complaint.

DISCUSSION

The standard for reviewing a Magistrate's report and recommendation is set forth in 28 U.S.C. § 636(b) which states that a district court judge should "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." Since this case involves cross motions for summary judgment, the Court must determine whether genuine issues of material fact exist, and if not, whether judgment should be rendered

in favor of plaintiff or defendant, wholly or in part as a matter of law. Fed.R.Civ.P. 56. See Vette Co. v. Aetna Casualty & Surety Co., 612 F.2d 1076 (8th Cir. 1980).

A. Gasoline Overcharging

Plaintiff claims defendant was required by the EPAA to distinguish for pricing purposes between N dealers that operated car wash gasoline stations and other retail dealers. Defendant contends that it was not required to treat N dealer car wash gasoline stations, such as plaintiff, differently from other retail purchasers. Therefore, defendant argues that its reduction and withdrawal of plaintiff's price allowance did not violate the EPAA or the regulations promulgated thereunder,

but, in fact, was mandated by the Robinson-Patman Act, 15 U.S.C. § 13 which prohibits discriminating between different purchasers of commodities of like grade and quality. The parties stipulate that if the Court finds defendant properly determined its class of purchaser under the petroleum price regulations, 10 C.F.R. §§ 212.31, 212.82, 212.83, then plaintiff was not overcharged. But if defendant improperly determined its class of purchaser, then under section 210 of ESA defendant overcharged plaintiff by $80,493. Thus, the issue is whether defendant properly classified plaintiff under the applicable regulations.

A seller was not allowed to raise its prices above those in force on May 15, 1973

for a particular "class of purchaser." 10 C.F.R. §§ 212.83(a), (b), 212.93(a). The purpose of this "class of purchaser" concept was "to maintain the price differentials that existed on May 15, 1973 between groups of purchasers which were not similarly situated." FEA Ruling 1975-2, 40 Fed. Reg. 10,655 (1975).

A "class of purchaser" was defined as:

> purchasers to whom a person has charged a comparable price for comparable property or services pursuant to customary price differentials between those purchasers and other purchasers.

10 C.F.R. § 212.31. A "customary price differential" was defined to include:

> a price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery.

Id. A class of purchaser was determined by examining the seller's pricing treatment of buyers as of May 15, 1973. Pricing treatment based solely on competitive conditions did not constitute a class of purchaser. FEA Ruling 1975-2 at 16,588. Therefore, if defendant's classification of plaintiff in this case was based solely on competitive conditions, defendant's action was justified.[2]

Applying Ruling 1975-2, particularly Example 7, the Magistrate concluded that the "discounts afforded the N dealer car

---

2 The regulations required a seller to classify those buyers who were not purchasers of the seller on May 15, 1973 according to the same objective pricing standards applied by the seller on that date. FEA Ruling 1975-2. Thus, defendant was required to classify plaintiff as it would have done on May 15, 1973.

wash stations on May 15, 1973, while extended to meet competing offers of Mobil's competitors, also reflected cost savings to Mobil. Thus, they were 'customer price differentials' that Mobil was required to maintain by classifying the car wash dealers as a separate and distinct class of purchaser." Magistrate's Report and Recommendation at 19.

Defendant argues that under Ruling 1975-2[3] plaintiff must demonstrate to the Court that the competitive allowance reflected a cost savings to defendant. If there was no such cost savings, defendant

---

3 Ruling 1975-2 was issued to clarify the application of the regulation's class of purchaser concept and to resolve questions regarding the FEA's earlier interpretations, Ruling 1974-17 and Ruling 1974-18.

contends it would be liable under the Robinson-Patman Act for granting a competitive allowance to plaintiff. Defendant alleges that plaintiff's evidence which shows plaintiff was a higher volume purchaser than other retailers, and owned its own lot and equipment, does not necessarily demonstrate a cost savings to defendant. As further evidence that plaintiff did not belong to a separate class of purchaser, defendant points to the parties' monitoring of the competitive situation in succeeding years, and to certain letters exchanged between the parties, as evidence that the allowance was given only for competitive reasons.

Defendant cites a number of cases interpreting Ruling 1975-2 as supporting

its position that it classified plaintiff correctly. See Templeton's Service, Inc. v. Mobil Oil Corp., 624 F.2d 1084 (Temp.Emer.Ct.App.), cert. denied, 449 U.S.890 (1980); Merry Twins, Inc. v. Exxon Corp., 611 F.2d 874 (Temp.Emer.Ct.App. 1979); Mr. Magic Car Wash, Inc. v. Department of Energy, 596 F.2d 1023 (Temp.Emer.Ct.App. 1978); Boehm v. Gulf Oil Company of Pennsylvania, Inc., 496 F.Supp. 1060 (E.D.Pa. 1980). The Magistrate correctly distinguished Merry Twins, Mr. Magic and Boehm from this case because in those three cases the plaintiffs offered no evidence to support their contentions the discounts granted to them were cost-justified to the supplier while in this case there are stipulated facts to support

plaintiff's contention.(See Magistrate's Report and Recommendation at 19-22 for a more detailed discussion of Mr. Magic and Merry Twins.)

In Templeton, four Mobil N dealers alleged Mobil violated the FEA regulations by withdrawing certain allowances that were being paid to plaintiffs on May 15, 1973. The district court decided sua sponte that "Mobil's N dealers and OG&L comprised two different classes of purchasers because there existed hidden 'cost-justified,' 'customary price differentials' between them and that Mobil should have computed a separate base price for each class." Templeton at 1086. The district court found that the customary price differential was cost justified because Mobil saved

money by doing business with N dealers since Mobil had no expenses relating to the upkeep, ownership, or leasing of property on which the stations of N dealers were located. Templeton at 1087. The Temporary Emergency Court of Appeals reversed this finding because the issue was never raised, by the parties in the district court. Nevertheless, the court went on in dictum to discuss whether the cost savings discussed by the district court could be considered in determining a class of purchasers. The court in Templeton stated it was improper to compare the costs of N dealers to rental paid by OG&L dealers based on its decision in Shell Oil Co. v. Federal Energy Administration, 400 F. Supp. 964 (S.D. Tex.), aff'd, 527 F.2d 1243

(Temp.Emer.Ct.App. 1975). In Shell Oil, the court held that the FEA does not have authority to control rates charged for service station property. Hence, the Templeton court concluded that a seller's cost savings or advantage attributable to upkeep, ownership or leasing of property could not constitute customary price differentials under the EPAA. Templeton at 1087 (dictum)."[4]

---

4 The discussion in Templeton of the relationship between Shell Oil and Ruling 1975-2 was unnecessary to the resolution of the case. Further, Shell Oil suggests:

> when the lessor of property is al so the gasoline supplier for a lessee-dealer, that relationship can have an impact on the pricing of the gasoline.Ruling 1975-2 recognizes as much. It does not allow the FEA (now the DOE) to

(Footnote 4 Continued on Next Page

In Pacific Service Stations Co. v. Mobil Oil Corp., 636 F.2d 306, 308 (Temp.Emer.Ct.App. 1980), the court discussed in greater detail the determination of a class of purchaser. The court, in Pacific Service, stated that the purposes of Ruling 1975-2:

> are not limited to explaining the distinction between cost-justified and competitive discounts. That distinction is only one factor to be taken into account in delineating appropriate purchaser classes.

(Footnote 4 Continued from Previous Page)
regulate the rent charged but it does require in some circumstances that those dealers who rent from the supplier be treated as a separate class of purchaser.

Templeton at 1088 (Larson, Jr., concurring.) Hence, the court's analysis in Templeton as to the relationship between Shell Oil and the determination of a class of purchasers is questionable.

> Others discussed in the Ruling include the location of the terminal from which gasoline is obtained by purchasers, the volumes purchased, the terms and conditions of sale, and the type of purchaser.

Pacific Service, 636 F.2d at 310 (footnote omitted). The Magistrate discusses the other factors used to delineate purchaser classes, especially the volumes purchased. The other factors mentioned in Pacific Service and discussed by the Magistrate support his conclusion that defendant improperly classified plaintiff under the applicable regulations.

The court in Pacific Service notes that the competitive/cost justification distinction only relates to the Ruling's discussion of the Robinson-Patman Act. Pacific Service, 636 F.2d at 310 n.6.

Defendant asserts that it did not classify plaintiff differently because if it had, it would have incurred liability under the Robinson-Patman Act. The relationship between Ruling 1975-2 and the Robinson-Patman Act is discussed in Evanson v. Union Oil, 4 Energy Management (CCH) ¶ 26,158 (D.Minn. 1979). In discussing whether defendant had a valid defense under the antitrust laws, the court in Evanson states:

> The nub of the matter is that if Union complied with ESA, EPAA, the regulations and Ruling 1975-2, it most likely did not violate the Robinson-Patman Act. If Union complied with ESA, EPAA, the regulations and Ruling 1975-2 but violated the Robinson-Patman Act in so acting, it does not incur antitrust liability since the later enacted regulatory scheme is pre-emptive of the antitrust laws in that situation. Therefore the antitrust laws are not implicated in this lawsuit . . . .

Evanson at p. 27,403. This approach suggests that the crucial inquiry for the Court is a determination of whether Ruling 1975-2 has been met, and if it has, it need not be concerned about potential antitrust liability.

The situation in the instant case is similar to Example 7 to Ruling 1975-2, and thus, the Court holds that Ruling 1975-2 has been met. The Magistrate's report and recommendation at pages 16-17 sets out Example 7 and in brackets puts in the facts of the instant case:

> Example 7: On May 15, 1973, Firm G [Mobil] charged most of its 500 [111] branded dealers a dealer's tankwagon price of 15 [x] cents per gallon for motor gasoline. Included in those dealers were 25 [5] which sold gasoline in connection with car wash operations which they owned. Of the 25 [5] car wash dealers, Firm G [Mobil] had given 20 [5] of

them various discounts, determined on an individual basis, to meet equally low offers of competitors. Similar competitive discounts were given to approximately four [19] of Firm G's non-car wash dealers. All of the 25 [5] car wash dealers sold approximately equal volumes of gasoline, and all of them had substantially greater capital investments in their stations and sold higher volumes of gasoline than the rest of Firm G's [Mobil's] dealers.

The application of the class of purchaser doctrine here should be similar to its application in Example 5. Firm G [Mobil] is required to treat all 25 [5] of the car wash dealers as being in the same class of purchaser and in a distinct class of purchaser from its 475 [106] non-car wash dealers. This is so because the higher volumes and the substantially greater investments in their stations of the car wash dealers are in themselves justifications under the Robinson-Patman Act for treating the car wash dealers differently. Firm G [Mobil] is not required, however, to maintain separate classes of purchaser for those car wash dealers that had

> competitive discounts in effect on May 15, 1973 and those car wash dealers that did not, since those car wash dealers that had discounts in effect are distinguishable from other car wash dealers only in that they had received lower offers from a competitor of Firm G [Mobil]. Similarly, with the non-car wash class, Firm G [Mobil] need not maintain a separate class of purchaser for four [19] non-car wash dealers that received discounts only to meet competition. . . .

Ruling 1975-2 has been met because the instant case also involves a plaintiff selling higher volumes, and making a substantially greater investment. Accordingly, the Court will accept the Magistrate's report and recommendation and grant plaintiff's motions for summary

judgment on Counts I and II of its amended complaint.[5]

B. Discontinuance of Credit Card Program

The Magistrate summarized the facts pertinent to Count III of plaintiff's amended complaint as follows:

> The parties stipulate that Mobil accepted the Master Charge and Visa credit card invoices of Typhoon's patrons at the time the parties entered into their 1977 supply contracts. Both parties imply that this credit practice existed on May 15, 1973 between Mobil and its retail dealers. They agree that Mobil discontinued this practice in September of 1979 and from then on accepted only Mobil credit card sales invoices. Upon eliminating this practice, Mobil readjusted its gasoline prices in accordance with the Proposed Remedial Order in In Re Getty Oil

---

5 However, judgment will not be entered pursuant to Fed.R.Civ.P. 54(b) until the other matters in the case are resolved.

> Company, United States Economic Regulatory Administration, Pacific District - Office of Special Council, Case No.680R00097, July 20, 1978 ("Getty"). Typhoon then entered into an independent relationship with Master Charge and Visa at an additional cost to Typhoon of $19,903.78 for the period of October, 1979 to January 28, 1981.

Magistrate's Report and Recommendation at 31. Plaintiff claims that defendant violated the normal business practice rule of 10 C.F.R. § 210.62 by discontinuing its Master Charge and Visa credit card programs. Defendant's action imposed more stringent credit terms without properly compensating plaintiff causing plaintiff to suffer a legal wrong under section 210 of ESA. The business practice rule provides as follows:

> (a) Suppliers will deal with purchasers of an allocated

> product according to normal business practices in effect during the base period specified in Part 211 for that allocated product, and no supplier may modify any normal business practice so as to result in the circumvention of any provision of this chapter. . . . Credit terms other than those associated with seasonal credit programs are included as part of the May 15, 1973 price charged to a class of purchaser under Part 212 of this Chapter.
>
> . . . .
>
> (c) Any practice which constitutes a means to obtain a price higher than is permitted by the regulations in this chapter or to impose terms or conditions not customarily imposed upon the sale of an allocated product is a violation of these regulations. Such practices include . . . failure to provide the same services . . . previously sold.

10 C.F.R. § 210.62 (1974) (emphasis added). Defendant asserts that it made a compensatory reduction in the base price of

its gasoline at the time it eliminated its credit card program in compliance with Getty, and thereby, insulated itself from any liability to plaintiff. Defendant emphasizes that although Getty was an administrative decision the Court should give deference to the agency's decision.

The Magistrate concluded that Count III is not ripe for summary judgment. He distinguishes Getty from the instant case because Getty was an action brought by the United States under section 209 of ESA on behalf of all consumers while this case is a private action brought by one party under section 210 of ESA. An action brought on behalf of all consumers involves different interests than an action brought by a private party. According to the

Magistrate, the crucial issue is whether applying the procedures utilized in Getty satisfies defendant's obligations under the price controls. He found there "is no evidence before the court to enable it to conclude that compliance with the price reduction formula in Getty was appropriate." Magistrate's Report and Recommendation at 33.

Both parties disagree with the Magistrate and maintain that Count III is ripe for summary judgment. At no point has defendant denied its failure to fulfill the business judgment rule. Instead, it has consistently asserted that its compliance with Getty insulated it from liability. Plaintiff, citing Bulzan v. Atlantic Richfield Co., 620 F.2d 278

(Temp.Emer.Ct.App. 1980), contends that actions brought under sections 209 and 210 of ESA are not mutually exclusive remedies, and therefore, compliance with Getty does not ultimately insulate defendant."[6]

The issue in Bulzan, was whether a party is entitled to bring a private action for treble damages and injunctive relief under section 210 of ESA when the violations that underlie the action have already been the subject of a remedial order of the FEA. The court held a party is entitled to bring a private action, and noting that "the provisions for a private

---

6 Plaintiff does admit that defendant's reduction of its prices in compliance with Getty mitigates the amount for which the defendant is liable under Count III. Accordingly, plaintiff has lowered its request for damages under Count II by $3,479.53.

remedy under section 210 focus on the relationship between a violator of a FEA or DOE regulation and an aggrieved party, while the provisions for an administrative remedy under the Act focus on the relationship between a violator and the federal government." Bulzan at 282. This approach suggests the procedure set forth in Getty does not bind the Court because Getty focused on the relationship between a violator and the federal government, and not the relationship between an alleged violator and a private party.

Furthermore, Getty, itself suggests that a seller may not be insulated from additional liability even though it makes a compensatory reduction in the base price of gasoline at the time it discontinues its credit card program:

> 4. Special Counsel has considered the possibility that the remedy ordered in paragraph 2 above may not operate to compensate fully those independent branded dealers who reinstituted bank card services at their own expense following Skelly's discontinuance of such services on April 1, 1974. In the absence of facts, which indicate the extent to which such dealers did continue the bank cards at their own expense, it has been concluded that the remedy ordered in paragraph 2 offers both a fair approximation of actual damages and a remedy which can be implemented in an expeditious fashion. Should a basis for concluding that this remedy is insufficiently precise appear during future proceedings in this case, Special Counsel will of course not object to an appropriate modification.

Getty at 27. The instant case does have evidence that the plaintiff continued the bank cards at its own expense. Therefore, compliance with Getty does not automatically insulate defendant from additional liability.

Since defendant relied on Getty as controlling this case, it has not rebutted plaintiff's claim of harm, or refuted plaintiff's assertion as to the appropriate measure of damages. In fairness to both sides the Court directs that plaintiff and defendant be given an opportunity to reargue and present evidence on this part of the case before the Magistrate. As suggested by the Magistrate, both parties should specifically address mitigation of damages and submit facts to support their arguments. Accordingly, the Court denies the parties' motions for summary judgment as to Count III, and holds that compliance with Getty does not automatically insulate defendant from liability.

C. Fraud

No objections were made to the Magistrate's denial of defendant's motion for summary judgment on Count IV of the amended complaint.

D. Prejudgment Interest, Treble Damages, and Attorneys' Fees and Costs with Respect to Count I of Plaintiff's Amended Complaint

Plaintiff has requested that the Court award prejudgment interest, treble damages, and attorneys' fees and costs with respect to Count I of its amended complaint. Plaintiff cites Eastern Air Lines, Inc. v. Atlantic Richfield Co., 712 F.2d 1402 (Temp.Emer.Ct.App. 1983) as supporting its claim. In Eastern, the court upheld the district court's denial of prejudgment

interest, treble damages, and attorneys' fees under section 210 of ESA.[7]

---

7 Section 210 ESA, 12 U.S.C. § 1904 note provides in pertinent part:

> (b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:
>
> (1) an amount not more than three times the amount of the overcharge upon which the action is based, or
>
> (2) not less than $100 or mo re than $1,000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance procedures reasonably adapted to the avoidance of such error the

Plaintiff asserts that Eastern allows prejudgment interest under section 210 of ESA whenever the amount of the recovery can be easily calculated. The court in Eastern, however, suggested a more stringent test.

(Footnote 7 Continued)

> liability of the defendant shall be limited to the amount of the overcharge: Provided, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.
>
> There is no evidence before the Court on whether

In Eastern, the court stated "at all times during this litigation it was evident that the amount claimed by Eastern was the subject of great uncertainty, and it would be inequitable and unjust to make such an award in this case." Eastern, 712 F.2d at 1410. Further, the court added that section 210 of ESA provided "that when an overcharge was unintentional, Congress had placed a specific limitation on the remedy which was not meant to be exceeded by prejudgment interest." Id. Therefore, in the instant case, if defendant's overcharge was unintentional, plaintiff cannot recover prejudgment interest. The stipulated facts

---

(Footnote 7 Continued)
plaintiff presented the defendant with a bona fide claim.

provide nothing upon which the Court can make a decision about defendant's intentions, and thus, it would be improper to grant prejudgment interest until evidence is introduced showing defendant acted intentionally. Similarly, more evidence is needed in order to determine whether the plaintiff is entitled to treble damages, and attorneys' fees and costs.[8]

---

8 The plaintiff believes the court in Eastern places the burden on plaintiff to prove justification for trebling damages and granting attorneys' fees and costs. The plaintiff misinterprets the court in Eastern because the court first sets a standard which would take away a court's discretionary power to award treble damages or attorneys' fees. Then, the court sets forth the following criteria for a judge to use in determining whether to grant treble damages or attorneys' fees:

> In the absence of such proof by t he defendant the Court in its discretion may award treble

Accordingly, plaintiff should be given the opportunity to present evidence to the Magistrate showing defendant's intentional conduct.

Accordingly, IT IS ORDERED that plaintiff's motion for summary judgment in

---

(Footnote 8 Continued)
damages and attorney's fees if it finds the overcharge was intentional or resulted from reprehensible or criminal conduct, or lack of procedures reasonably adapted to the avoidance of erroneous overcharges, or bad faith, or where required by equity and the ends of justice.

Eastern, 712 F.2d at 1412. Hence, the court does not place the burden on the plaintiff, but gives some guidelines to use in deciding whether to grant treble damages or attorneys' fees. There is no evidence currently on the record before the Court which would justify the Court granting treble damages or attorneys' fees and costs under the criteria set forth in Eastern.

Counts I and II is granted, and the parties' motion for summary judgment in all other respects is denied.

IT IS FURTHER ORDERED that the case be remanded to the Magistrate so the parties may address mitigation of damages and submit evidence as to Count III, and submit evidence as to plaintiff's request for prejudgment interest, treble damages, and attorney's fees and costs with respect to Count I.

Judge Harry H. MacLaughlin
United States District Court

Dated: October 28, 1983

JSS:AP3

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Typhoon Car Wash, Inc., a Minnesota corporation,

Plaintiff,

v.

Mobil Oil Corporation, a New York corporation,

Defendant.

CIVIL 4-80-257

MEMORANDUM AND ORDER

Robert J. Hennessey and Jon S. Swierzewski, Larkin, Hoffman, Daly & Lindgren, Ltd., 1500 Northwestern Financial Center, 7900 Xerxes Avenue South, Minneapolis, Minnesota 55431, for plaintiff.

Thomas C. Kayser, Robins, Zelle, Larson & Kaplan, 33 South Fifth Street, Minneapolis, Minnesota 55402, and Jeffrey C. Danek and Robert C. Fox (of counsel), P.O. Box 66568, AMF O'Hare, Illinois 60666, for defendant.

This matter is before the Court on the parties' objections to the March 14, 1984 report and recommendation of the United States Magistrate.

FACTS

In this action, the plaintiff claims that:

(1) defendant placed plaintiff in an incorrect class of purchaser, and thus, overcharged plaintiff for gasoline purchases in violation of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. § 1904, as incorporated by the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. § 751, et seq. (Count I, amended complaint);

(2) defendant placed plaintiff in an incorrect class of purchaser, and thus, plaintiff suffered a legal wrong under the ESA and EPAA (Count II, amended complaint);

(3) defendant violated the ESA and EPAA by discontinuing its practice of accepting the Master Charge and Visa credit card invoices of plaintiff's patrons as payment for gasoline purchased by plaintiff from defendant. The plaintiff claims that the discontinuance amounted to the imposition of more stringent credit terms without the required reduction of its gasoline prices, and that it damaged plaintiff to the extent that plaintiff was forced to enter into a more costly independent relationship with Master Charge and Visa (Count III, amended complaint);

(4) plaintiff entered into the 1977 contracts with defendant in detrimental reliance on a misrepresentation made by defendant's representative regarding the gasoline price discounts defendant afforded its retailers during the 1973 Arab Oil Embargo (Count IV, amended complaint).

In a memorandum and order dated October 28, 1983 (Order), the Court granted plaintiff's

motion for summary judgment as to Counts I and II, but denied the motion for summary judgment as to Counts III and IV. The Court also refused to enter judgment pursuant to Federal Rule of Civil Procedure 54(b) as to Counts I and II until the other matters in the case were resolved. The Court remanded the case to the Magistrate so that the parties could submit evidence as to mitigation of damages in Count III, and submit evidence as to plaintiff's request for prejudgment interest, treble damages, and attorneys' fees and costs.

Prior to the hearing before the Magistrate, the parties stipulated as follows:

1. Mobil's alleged overcharge in this matter was neither willful nor intentional as those terms are used in Section 208 and 210 of the

Economic Stabilization Act as amended.

2. At all times herein, Mobil's actions with respect to the withdrawal of the competitive allowance was [sic] based on its belief that withdrawal of said competitive allowances was necessary to avoid liability of Mobil under the Robinson-Patman Act.

Report and recommendation at 2. The Magistrate adopted the stipulation. Also, the plaintiff withdrew its request for treble damages, and defendant declined to offer any additional evidence with respect to the issues raised in Count III of plaintiff's amended complaint. Accordingly, the Magistrate recommended that the Court:

1. grant summary judgment as to Count III in the sum of $16,424.25;

2. deny plaintiff's claim for prejudgment interest because defendant's conduct was not intentional;

3. grant plaintiff's claim for reasonable attorneys' fees and costs;

4. order plaintiff to disclose to defendant the time and disbursements records of its attorney;

5. remand to the Magistrate for the purposes of a hearing to determine an appropriate attorneys' fees and costs award, if the parties are unable to agree as to an amount of attorneys' fees and costs award;

6. order the Clerk to enter judgment on Counts I, II, and III of plaintiff's amended complaint.

Plaintiff objects to the Magistrate's recommendation that plaintiff's claim for prejudgment interest be denied. The plaintiff argues that the Magistrate's recommendation that plaintiff not be awarded prejudgment interest is inconsistent with decisions of the Temporary Emergency Court of Appeals.

Also, plaintiff requests that the Court make an express determination that there is no just reason for delay, and order that judgment be entered pursuant to Federal Rule of Civil Procedure 54(b) as to Counts I, II, and III of plaintiff's amended complaint.

On the other hand, defendant objects to the Magistrate's recommendation that the Court award plaintiff attorneys' fees and costs incurred in connection with this litigation. The defendant expresses no opinion as to whether judgment should be entered pursuant to Rule 54(b).

DISCUSSION

The standard for reviewing a Magistrate's report and recommendation is set forth in 28 U.S.C. § 636(b) which

states that a district court judge should "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." The Court adopts the parties' stipulation that defendant's overcharge was neither willful nor intentional, and that defendant's actions with respect to the withdrawal of the competitive allowances were based on its belief that withdrawal of said competitive allowances was necessary to avoid liability under the Robinson-Patman Act.

A. Discontinuance of Credit Card Program

In its previous Order, the Court concluded that defendant's compliance with In Re Getty Oil Company, United States Economic Regulatory Administration, Pacific

District - Office of Special Council, Case No. 680R00097, July 20, 1978 (Getty) did not insulate the defendant from liability for no longer accepting the Master Charge and Visa credit card invoices of plaintiff's patrons as payment for gasoline purchased by plaintiff from defendant. This action by the defendant violates the normal business practice rule of 10 C.F.R.§ 210.62 according to the plaintiff (Count III, amended complaint). The Court denied the parties cross motions for summary judgment on Count III, and authorized the Magistrate to accept any additional evidence which mitigated plaintiff's damage claim. The defendant did not offer any additional evidence. Accordingly, the Magistrate recommended that summary

judgment be entered in plaintiff's favor on Count III of the amended complaint in the amount of $16,424.25.[1]

Since the Court concluded compliance with Getty did not insulate the defendant from liability, and defendant did not offer any further support for its position, the Court accepts the Magistrate's recommendation, and will grant plaintiff's motion for summary judgment on Count III of the amended complaint in the amount of $16,424.25. Accordingly, the Court finds that the defendant violated the normal business practice rule of 10 C.F.R. §

---

1 The damage amount is based on plaintiff's damage incurred in securing independent relationships with Master Charge and Visa in the amount of $19,903.78 less the $3,479.53 in price reduction it enjoyed because of defendant's compliance with Getty.

210.62 by discontinuing its Master Charge and Visa credit card program.

B. Prejudgment Interest

In its previous Order, the Court concluded that "if defendant's overcharge was unintentional, plaintiff cannot recover prejudgment interest." Order at 25. The parties have stipulated that defendant's overcharge was neither willful nor intentional as those terms are used in sections 208 and 210 of the ESA. Accordingly, the Magistrate felt "constrained" to recommend that plaintiff's request for prejudgment interest be denied.

Plaintiff argues that the Court's conclusion that plaintiff cannot recover prejudgment interest if defendant's overcharge was unintentional is not

consistent with subsequent decisions of the Temporary Emergency Court of Appeals. In response, defendant argues that the Court's conclusion, and the Magistrate's recommendation that prejudgment interest not be awarded is correct.

In its previous Order, the Court relied on Eastern Air Lines, Inc. v. Atlantic Richfield Co., 712 F.2d 1402 (Temp.Emer.Ct.App.), cert. denied, 104 S.Ct. 278 (1983), in finding that prejudgment interest would not be awarded if defendant's overcharge was unintentional. Order at 25. In holding that prejudgment interest would not be awarded, the Eastern court stated as follows:

> [The district court] denied the claim for prejudgment interest because he found Section 210 of

> the ESA provided that when an overcharge was unintentional, Congress had placed a specific limitation on the remedy which was not meant to be exceeded by prejudgment interest. Memorandum of Decision and Order, October 29, 1982, R. at 02664, n. 19. We agree with [the district court] that prejudgment interest is not available where the amount of damages claimed to be due is uncertain. Belcher v. Birmingham National Bank, 488 F.2d 474, 478 (5th Cir. 1973). At all times during this litigation it was evident that the amount claimed by Eastern was the subject of great uncertainty, and it would be inequitable and unjust to make such an award in this case.

Eastern, 712 F.2d at 1410.

Plaintiff contends that the Eastern court's denial of prejudgment interest was premised solely on the difficulty of ascertaining the amount of damages due. Thus, plaintiff argues that the Eastern court did not approve of denying

prejudgment interest because the overcharge was unintentional. Plaintiff's argument that the Eastern decision should be read as requiring a denial of prejudgment interest only when the amount of damages claimed to be due was uncertain finds support in Zahir v. Shell Oil Co., 718 F.2d 1567 (Temp.Emer.Ct.App. 1983).

In Zahir, the court denied the plaintiff's request for prejudgment interest because the amount of damages was not easily ascertainable. In summarizing the law where no provision of any statute requires an award of prejudgment interest, as in the instant action, the court quoted the following passage from Hodgson v. American Can Company, 440 F.2d 916, 922 (8th Cir. 1971):

> "In the absence of an unequivocal prohibition of interest, and where the statute imposes a money obligation, the power of the court to award interest is dependent on an appraisal of the congressional purpose of imposing the obligation and on the relative equities of the parties." Rodgers v. United States, 332 U.S.371, 68 S.Ct. 5, 92 L.Ed. 3.

Zahir, 718 F.2d at 1572. Under this approach, whether prejudgment interest will be awarded turns not on whether the defendant's conduct was intentional, but on whether the amount of damages was certain, and on the congressional purpose behind the EPAA and a balancing of equities.

The congressional purpose of the EPAA is to compensate those who have been overcharged for the losses they sustained as a result of the overcharge. See Minnesota v. Standard Oil Co., 516 F. Supp.

682, 687 (D.Minn. 1981). In addition, Congress wanted to give private individuals an incentive to bring these actions because Congress itself had not established an adequate means to enforce the statute. Wellven, Inc. v. Gulf Oil Corp., 731 F.2d 892, 897 (Temp.Emer.Ct.App. 1984). Accordingly, the Court finds that an award of prejudgment interest to compensate a plaintiff for the loss of the use of money is consistent with the congressional purpose of the EPAA.

The Court also finds that equitable considerations favor an award of prejudgment interest because the defendant has been using plaintiff's money for five years without paying for the use of that money. However, the amount plaintiff was

entitled to recover was not certain until April 9, 1982, when the parties entered into a stipulation as to the amount of damages.[2] Accordingly, the Court holds that, as to Counts I and II of plaintiff's amended complaint, the plaintiff is entitled to recover prejudgment interest from April 9, 1982. Since there was no stipulation as to the amount of damages in Count III, and since the Court has concluded that the amount was uncertain, there will be no grant of prejudgment interest as to Count III.

Plaintiff has submitted a proposed method of calculating prejudgment interest.

---

2 Although selecting the correct method for calculating the damages may have been difficult, once the method was selected, the calculation was not difficult.

Defendant has not responded to this proposal. The Court encourages the parties to agree to a method of calculating the prejudgment interest. If the parties cannot agree as to a method of calculating prejudgment interest within 30 days of the date of this Order, however, they are directed to schedule a hearing before the Magistrate. Accordingly, the case is remanded to the Magistrate to determine the appropriate method of calculating prejudgment interest if the parties are unable to agree within 30 days of the date of this Order. If the parties can agree to a method of calculating prejudgment interest then that method should be submitted to the Court for review.

C. Attorneys' Fees

In his March 14, 1984 report and recommendation, the Magistrate recommended that the Court award plaintiff attorneys' fees and costs pursuant to section 210(b) of the ESA which provides as follows:

> In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:
>
> > "(1) an amount not more than three times the amount of the overcharge upon which the action is based, or
> >
> > "(2) not less than $100 or more than $1,000;
>
> except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall

> be limited to the amount of the overcharge: Provided, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

Section 210 ESA, 12 U.S.C. § 1904 note (emphasis added).

The court in Eastern Air Lines, Inc. v. Atlantic Richfield.Co., 712 F.2d 1402, 1412 (Temp.Emer.Ct.App.), cert. denied, 104 S.Ct. 278 (1983), concluded that the "except" clause of section 210(b) affected the court's discretionary authority to award attorneys' fees under section 210, and stated as follows:

> [T]he court is given discretionary power to award treble damages and

> attorney's fees except in the event of proof by the defendant "that the overcharge was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error." (Emphasis added.) § 210(b)(2). So to deprive the court of its discretionary power to award treble damages and attorney's fees, the defendant making the overcharge must prove that (1) the overcharge was not intentional, and (2) the overcharge resulted from a bona fide error notwithstanding (3) the maintenance by the defendant of procedures reasonably adapted to the avoidance of such error.

The Temporary Emergency Court of Appeals recently reached the same conclusion in Gulf Oil Corp. v. Dyke, Nos. 9-80, 9-81, slip op. (Temp.Emer.Ct.App. Apr. 17, 1984). Thus, the question before the Court is whether the defendant's conduct was the type of unintentional error that insulates

it from liability for attorneys' fees and costs.

In recommending that the Court award attorneys' fees and costs, the Magistrate stated as follows:

> [I]t is the undersigned's view that the defendant has not satisfied the except clause of Section 210 because, although the overcharge was not intentional within the meaning of Section 208 and 210 (i.e., it was not criminal), it did not occur because of a bona fide error occurring notwithstanding the maintenance of procedures reasonably adopted to the avoidance of such an error. Rather, it occurred, because of defendant's legal conclusion that the withdrawal of competitive allowances was required to avoid liability under the Robinson-Patman Act. The overcharge was not erroneous. It occurred because Mobil made a mistake with respect to its legal analysis.

Report and recommendation at 8. Thus, the Magistrate found that a mistake of law

is not the kind of bona fide error Congress had in mind when it enacted section 210. Rather, he concluded that the type of errors Congress had in mind would be billing errors or the like which might occur despite the fact the defendant "had in place procedures designed to check up on those responsible for, in the first instance, preparing the bill." Report and recommendation at 8.

The Court agrees with the Magistrate's conclusion that a mistake of law is not the type of error which takes away a court's authority to impose attorneys' fees and costs. Accordingly, the Court adopts the Magistrate's recommendation that the plaintiff be awarded its attorneys' fees and costs.

No discovery has been done with respect to the amount of attorneys' fees involved in this action. At the oral argument before the Magistrate, the parties agreed that, if the Court concludes that an award of attorneys' fees is appropriate, plaintiff's attorney would disclose to defendant's attorney his time and disbursements records. Following that, if the parties can agree as to an amount, the amount will be submitted to the Court in the form of a stipulation between the parties. However, if the parties cannot agree as to an amount, an additional hearing will be necessary to determine the amount of fees and costs to be awarded. Thus, the Court orders that plaintiff disclose its time records and disbursements

records to the defendant's attorney within 14 days of the date of this order. If the parties cannot stipulate as to the amount of attorneys' fees and costs within 30 days of the date of this order, they are directed to schedule a hearing before the Magistrate. Accordingly, this case is remanded to the Magistrate to determine the appropriate amount of attorneys' fees and costs if the parties are unable to stipulate as to the amount.[3]

Based on review of the files, records and memoranda, and the Court being fully apprised in the premises,

---

3 The Court will not determine whether judgment will be entered on Counts I, II, and III pursuant to Federal Rule of Civil Procedure 54(b) until the amounts of prejudgment interest and attorneys' fees and costs are determined. Once the amounts are determined, the

IT IS ORDERED that the plaintiff's motion for summary judgment as to Count III of plaintiff's complaint is granted in the amount of $16,424.25.

IT IS FURTHER ORDERED that plaintiff's motion for prejudgment interest as to Counts I and II is granted. The award of prejudgment interest is to commence on April 9, 1982. If, within 30 days of the date of this order, the parties are unable to agree as to a method of calculating the prejudgment interest, the case is remanded to the Magistrate in order to determine the appropriate method of calculating prejudgment interest and the amount of prejudgment interest. However, if the

---

(Footnote 3 Continued)
plaintiff may renew its motion to have judgment entered on those counts.

parties are able to agree as to a method of calculating prejudgment interest, then the parties should submit their stipulation to the Court.

IT IS FURTHER ORDERED that plaintiff's motion for prejudgment interest as to Count III is denied.

IT IS FURTHER ORDERED that plaintiff's motion for attorneys' fees and costs is granted. Plaintiff is ordered to turn over its time and disbursements records to the defendant within 14 days of the date of this order. If, within 30 days of the date of this order, the parties are unable to agree as to the amount of attorneys' fees and costs, the case is remanded to the Magistrate in order to determine the appropriate amount of attorneys' fees and

costs. However, if the parties are able to agree to an appropriate amount of attorneys' fees and costs, the stipulation should be submitted to the Court.

Judge Harry H. MacLaughlin
United States District Court

Dated: July 12, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Typhoon Car Wash, Inc., a Minnesota corporation,

Plaintiff,

v.

Mobil Oil Corporation, a New York corporation,

Defendant.

CIVIL 4-80-257

MEMORANDUM AND ORDER

Robert J. Hennessey and Jon S. Swierzewski, Larkin, Hoffman, Daly & Lindgren, Ltd., 1500 Northwestern Financial Center, 7900 Xerxes Avenue South, Minneapolis, Minnesota 55431, for plaintiff.

Thomas C. Kayser, Robins, Zelle, Larson & Kaplan, 33 South Fifth Street, Minneapolis, Minnesota 55402, and Jeffrey C. Danek and Robert C. Fox (of counsel), P.O. Box 66568, AMF O'Hare, Illinois 60666, for defendant.

This matter is before the Court on the plaintiff's request for entry of judgment. The Court previously granted summary judgment in favor of the plaintiff on Counts I through III of the plaintiff's complaint. See Orders of October 28, 1983, and July 12, 1984. The Court reserved entering judgment on those counts pending the parties' stipulations as to attorneys' fees and prejudgment interest.

The parties have now stipulated to an award of attorneys' fees to the plaintiff in the amount of $45,000, and an award of prejudgment interest to the plaintiff in the amount of $24,466.20. See Stipulation, August 27, 1984.

The Court finds, pursuant to Federal Rule of Civil Procedure 54(b), that there

is no just reason to delay entry of judgment and accordingly,

IT IS ORDERED that:

1. judgment be entered in favor of the plaintiff on Counts I and II combined in the stipulated amount of $80,493;

2. judgment be entered in favor of the plaintiff on Count III in the amount of $16,424.25;

3. judgment be entered in favor of the plaintiff for attorneys' fees in the stipulated amount of $45,000; and

4. judgment be entered in favor of the plaintiff for prejudgment interest in the stipulated amount of $24,466.20.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Judge Harry H. MacLaughlin
United States District Court

Dated: July 12, 1984

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 8-17

TYPHOON CAR WASH, INC.,
Plaintiff-Appellee,

v.

MOBIL OIL CORPORATION,
Defendant-Appellant.

BEFORE: JAMESON, GRANT and PECK, Judges.

O R D E R

Upon consideration of Appellee's Petition for Rehearing and/or Suggestion for Rehearing En Banc, it is hereby

ORDERED that the Petition for Rehearing is DENIED. It is FURTHER ORDERED that the suggestion for rehearing en banc is DENIED.

The Court's mandate shall be issued on Wednesday, August 14, 1985.

FOR THE COURT:

Donna M. Bold
Clerk

By: Terry Carty
Deputy Clerk

August 7, 1985

EMERGENCY PETROLEUM ALLOCATION ACT

. . .

15 U.S.C. § 751. Congressional findings and declaration of purpose

(a) Shortages. The Congress hereby determines that --

(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop planting and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and

constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

(b) Presidential authority. The purpose of this Act [15 USCS §§ 751 et seq.] is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act [15 USCS §§ 751 et seq.] shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

ECONOMIC STABILIZATION ACT OF 1970

. . .

§ 208 Sanctions; criminal fine and civil penalty

(a) Whoever willfully violates any order or regulation under this title shall be fined not more than $5,000 for each violation.

(b) Whoever violates any order or regulation under this title shall be subject to a civil penalty of not more than $2,500 for each violation.

. . .

§ 210 Suits for damages or other relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have

overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than $100 or more than $1,000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: Provided, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment

of such overcharge within ninety days from the date of the presentation of such claim.

(c) For the purposes of this section, the term "overcharge" means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

. . .

§ 211 Judicial review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this

title, the cases shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

. . .

(b)(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

. . .

(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Temporary Emergency Court of Appeals,

and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

ROBINSON-PATMAN ACT

. . .

15 U.S.C. § 13. Discrimination in price, services, or facilities

(a) Price; selection of customers. It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery

resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation, and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or

sales in good faith in discontinuance of business in the goods concerned.

(b) Burden of rebutting prima-facie case of discrimination. Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet any equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) Payment or acceptance of commission, brokerage or other compensation. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered

in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) Payment for services or facilities for processing or sale. It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) Furnishing services or facilities for processing, handling, etc. It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers

of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) Knowingly inducing or receiving discriminatory price. It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Ruling 1975-2

40 Fed. Reg. 10,655 (1975)

Class of Purchaser; Application of Term Under Petroleum Price Regulations

In Rulings 1974-17 and 1974-18 (39 F. R. 21042, June 18, 1974), the Federal Energy Administration set forth guidelines with respect to the meaning of the terms "class of purchaser" and "customary price differential" as defined in 10 CFR 212.31 and used in FEA's pricing regulations, 10 CFR, Chapter II, Part 212. While those rulings helped to clarify the application of the "class of purchaser" concept, it has subsequently come to FEA's attention that those rulings did not resolve all outstanding questions and that to some extent the rulings themselves have been misconstrued. This ruling is intended, therefore, to clarify further the application of the class of purchaser concept by supplementing Rulings 1974-17 and 1974-18. To the extent that there is any inconsistency between this ruling and those earlier rulings, this ruling will be controlling. Because of the complexity of this issue, this ruling will first discuss the general principles involved, and then illustrate some of those principles with factual examples.

Discussion

A. Background. FEA price regulations provide generally that sellers may charge prices for covered products that reflect their May 15, 1973 lawful selling prices and a dollar-for-dollar pass-through of the amount by which their product costs have increased since that time. Thus, each selling price determined under FEA price regulations has at least two components: that portion which represents a May 15, 1973 lawful selling price and that portion which represents a pass-through of increased product costs. In addition, a further increment to some selling prices is permitted, subject to certain conditions, to reflect increased non-product costs.

The portion of the selling price that represents a May 15, 1973 selling price is, with respect to each product sold to each buyer ". . . the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973. . . ." (§ 212.82(b); & 212.93(a)).

In making the computation of this "weighted average price . . . in transactions with the class of purchaser concerned on May 15, 1973," a firm "... may not exclude any temporary

special sale, deal or allowance in effect on May 15, 1973." (§ 212.82(b); & 212.93(b)).

Since increased product costs are generally required to be applied equally among classes of purchaser of a particular covered product, differences in weighted average May 15, 1973 selling prices among classes of purchaser are generally reflected in like differences in current lawful selling prices for that product among those classes of purchaser, and a principal function of the class of purchaser concept is to preserve the price distinctions among purchasers that customarily existed under free market conditions. To achieve the objective of making covered products available at equitable prices, FEA regulations require sellers to group together customers that are similarly situated and to compute a weighted average of their May 15, 1973 selling prices in sales to those customers. Sellers are thus required to maintain a single lawful price for a product to all customers that fall into a particular class, rather than having to establish individual maximum lawful prices to individual customers.

As noted above, sellers must compute for each product a single weighted average May 15, 1973 price for each class of purchaser of that product.

From the standpoint of the seller, the number of different classes of purchaser for which it computes separate weighted average May 15, 1973 prices will in most cases have no direct bearing on the amount of cost recovery or profits realized. The principal function of the doctrine is to maintain the price differentials that existed on May 15, 1973 between groups of purchasers which were not similarly situated then and are not now similarly situated.

That the maintenance or elimination of separate classes of purchaser will ordinarily have no bearing on the cost recovery or profits of the seller can be shown in a simplified example, as follows: A firm sold gasoline on May 15, 1973, with 50 percent of its sales at retail, at a weighted average retail price of 25 cents per gallon, and 50 percent of its sales at wholesale, at a weighted average wholesale price of 17 cents per gallon. That firm, if it were to disregard the distinctions between its classes of wholesale, and retail purchasers entirely, would calculate a single weighted average May 15, 1973 selling price of 21 cents per gallon for all of its gasoline sales, as to which it would then apply its increased product costs. In such a case, the firm would not recoup any greater amount of increased product costs or realize any greater profits

than if it had treated its retail and wholesale customers as separate classes of purchaser, with separate weighted average May 15, 1973 selling prices, assuming that its ratio between wholesale and retail sales remained at 50-50. Only if the ratio between its total wholesale and retail sales changed would the firm's revenues (and, potentially, its profits) be affected by whether or not separate classes of purchaser had been established for wholesale and retail sales.

The significance of the application of the class of purchaser concept is, therefore, principally to be found in its impact on the relative prices among buyers from a particular seller, rather than in any impact on the increased product cost recovery or profits of a seller.

B. Guidelines for Determining Classes of Purchaser. This ruling is intended to provide further guidance to sellers in making price distinctions between different purchasers, by reviewing some of the pertinent factors which must be considered in making class of purchaser determinations. This ruling also is to provide guidance concerning certain specific kinds of circumstances which involve Robinson-Patman Act considerations, and which are known to be the source of a particular difficulty with respect to this issue.

The basic guidelines for class of purchaser determinations are set forth in § 212.31, where the term "class of purchaser" is defined as:

> "purchasers or lessees to whom a person has charged a comparable price for a comparable property or service pursuant to customary price differentials between those purchasers or lessees and other purchasers or lessees."

The term "customary price differential" is defined in the same section as including:

> "a price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery." Both of these definitions were carried over virtually verbatim from the Economic Stabilization Regulations; 6 CFR 150.31, 38 FR 21592 (1973) and (6 CFR 150.352, 38 FR 22536) which were applicable generally to all sellers of goods and services, including petroleum products.

In order to clarify the application of these definitions, FEA issued, on June 12, 1974, Rulings 1974-17 and 1974-18.

Ruling 1974-17 stated that it was unlawful currently to charge different prices to individual purchasers which were members of the same class, even though those individual purchasers paid different prices on May 15, 1973. In that Ruling, FEA made it clear that:

> "A class of purchaser is . . . the smallest unit for which a uniform selling price may be computed because, by definition, no customary price differentials exist within a class of purchaser. It should be noted, however, that a class of purchaser may consist of only a single customer, if that particular customer alone was charged a comparable price for a comparable property or service pursuant to a customary price differential between the customer and all other customers."

Thus, Ruling 1974-17 dealt with a single class of purchaser, and described the proper means of determining a single weighted average May 15, 1973 price to that class of purchaser.

Ruling 1974-18 dealt principally with the issue of whether certain discounts constitute a "customary price differential" for purposes of determining whether separate classes of

purchaser exist. In that ruling, FEA stated that a discount off the published dealer tankwagon price for gasoline given on January 1, 1973 to "Company A," a "high volume retail outlet in a favorable location," as a "competitive inducement" of indefinite duration for it to continue to purchase gasoline from the supplier, and in effect on May 15, 1973, was "customary," but that a discount in effect on May 15, 1973, given to Company B on April 15, 1973 as "a form of subsidy" to be effective only so long as a "price war" situation lasted, was not "customary." Thus, Ruling 1974-18 stated that, with respect to the described types of discounts, FEA would look to whether the parties intended the discount to be temporary or customary. In order to assist in making that determination, Ruling 1974-18 created the following presumption:

> "[FEA] will generally regard any discount that was in effect on May 15, 1973, and that had either been in effect or had been granted for a period of six months or more, to be a customary discount. This presumption may be rebutted in particular situations by appropriate factual showing."

Ruling 1974-18 also made it clear that even though the supplier was not

required to maintain a separate class of purchaser with respect to its temporary discount sales, it nevertheless had to take that lower price into account in computing its May 15, 1973 weighted average lawful selling price with respect to all customers in the class of purchaser concerned. As noted above, §§ 212.82(b) and 212.93(d) require that in determining that weighted average May 15, 1973 price, all temporary special sales, deals or allowances have to be taken into account. Thus, Rulings 1974-17 and 1974-18 serve to make clear that, as to any particular class of purchaser, only a single price can be charged and that, for purposes of distinguishing between "customary" price differentials and "temporary" price differentials, there would be a presumption that discounts that had been in effect for at least six months on May 15, 1973, or which were in effect on May 15, 1973 and had been granted for a period of at least six months, represented customary price differentials.

The existence of a discount on May 15, 1973, is however, only one of several key elements which must be considered with respect to making class of purchaser determinations. The purpose of this ruling is to set out more explicitly the other key elements that must be taken into account in

determining the existence of separate and distinct classes of purchaser.

The determination of what constitutes a "comparable price" charged pursuant to a "customary price differential" should begin with the § 212.31 definition of "customary price differential," which, as indicated above, lists illustrative factors to be taken into account, to include:

> "a price distinction based on a discount, allowance, addon, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery."

The principal significance of the first portion of this definition, which refers to "a discount, allowance, add-on, premium, and an extra," is to indicate that a "price distinction" may exist not only because of different selling prices for a product, but may, in fact, exist even though selling prices are equal. Thus, although two purchasers may have purchased the same product at the same price on May 15, 1973, one price may have reflected a particular type of "allowance," whereas the other price may not have, so that the two purchasers could not appropriately be placed in the same class of purchaser.

The second portion of the definition, which adverts to the illustrative factors which may account for price distinctions, however they are expressed, is of particular significance in determining the classes of purchaser of each seller. For purposes of this ruling, the important factors aside from grade or quality, which do not require extended discussion herein, are differences in:

(1) location,

(2) type of purchaser,

(3) volume, and

(4) term or condition of sale or delivery.

These factors, in the order listed above, provide a logical sequence for making class of purchaser determinations.

Although price differentials may reflect differences in location both of the seller's outlet or distribution point and of the buyer's place of business, location should be considered first as it relates to the seller. To the extent that a seller has multiple locations from which it distributes products, it should make its class of purchaser determinations on a location-by-location basis. Only

to the extent that it can ultimately be determined that no customary price differentials were reflected between a seller's prices at two or more locations would it be possible for a seller to treat sales from such locations as being to the same class of purchaser.

In evaluating its sales from a particular location, a seller should next look to the types of customers it had, on May 15, 1973, for purposes of making price determinations. There are certain readily apparent distinctions to be made in this regard, such as those relating to recognized levels of distribution (e.g., wholesale, retail, end-user, etc.), those relating to methods of sale (e.g., branded, non-branded), and those relating to types of use (e.g., re-sale, industrial, commercial, residential, etc.). It should be noted in this regard that although certain industry-wide practices have existed in regard to certain "customer types," as to which customary price differentials existed, other practices as to price distinctions based on customer types may have varied from seller to seller, depending on circumstances.

Having determined those types of customers which were treated differently from other types of customers for pricing purposes on May

15, 1973, a firm must next determine, as to each such type of customer, the extent to which prices of products were differentiated according to volumes purchased (e.g., sales in cargo lots, barge sales, pipeline sales, tankwagon sales, sales made pursuant to a sliding volumetric discount scale, etc.).

Finally, a firm must determine, as to sales to each group of purchasers indentified under the foregoing criteria (those purchasers which bought at a price reflecting the seller's location, the type of purchaser involved, and the volume of product involved), the extent to which customary price differentials reflected differences in terms or conditions of sale or delivery on May 15, 1973. Such differences in terms or conditions may, of course, simply reflect purchaser delineations already made under other criteria, such as, for example, those respecting sales to branded and to non-branded dealers. Differing terms or conditions of sale or delivery may, however, also serve to delineate still further classes of purchaser which are not distinguishable under the other criteria.

A firm may, for example, make its product available to some customers on a delivered basis and to others at its terminal. Such a difference in the terms of sale to otherwise

indistinguishable purchasers would serve as the basis for a customary price differential between groups of purchasers, and thereby establish separate classes of purchaser.

It is in this area of differing terms and conditions of sale, and particularly where such terms and conditions, including price terms, were established by written contract on May 15, 1973, that class of purchaser determinations become most difficult.

In some instances, the fact that sales were made pursuant to contractual terms and conditions may serve to distinguish those purchasers from purchasers that did not buy under contract, and in others it may not. For example, if a seller sold a product to both contract and non-contract purchasers on identical terms and conditions, there would be no basis for establishing separate classes of purchaser. If, however, a firm's contract purchasers were generally those purchasers that bought all of their requirements from the firm over a given time period, whereas the firm's non-contract purchasers bought from the firm only on an occasional and unpredictable basis, and if this difference in methods of purchaser were reflected in a customary price differential, it would not be proper for the selling firm to place

its contract and non-contract purchasers in the same class.

In cases where all of the foregoing analysis has been made, and a firm's purchasers have been grouped into appropriate categories, there may nevertheless exist differences in prices charged to purchasers within those groups. Such differences might simply reflect the varying competitive situations at the various times when contractual prices were agreed to, or they may, upon closer examination, represent customary price differentials that have resulted from factors which may not even have been consciously averted to at the time, but which nevertheless can be objectively verified.

It is in this area, where purchasers are ostensibly similarly situated, that price distinctions become potentially at odds with the policies intended to be furthered by the Robinson-Patman Act.

Pricing structures in the petroleum industry, and particularly discount practices, reflect the requirements of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. §13, and the numerous Federal Trade Commission and federal court decisions which have applied the Act to the petroleum industry. Section 2(a) of the Clayton

Act, as amended by the Robinson-Patman Act, provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ." 15 U.S.C. § 13(a).

Thus, a seller is prohibited from discriminating in price between two of its customers if the effect of such discrimination may be substantially to lessen competition or to injure, destroy or prevent competition with any person who either (i) grants the discrimination (so-called primary line injury); (ii) knowingly receives the benefit of the discrimination (secondary line injury); or (iii) is a customer of the person receiving the benefit of the discrimination (tertiary line injury).

The Robinson-Patman Act recognizes two principal types of exceptions to the general policy against discrimination between two customers. The first, commonly referred to as the "cost justification" defense, is:

> "That nothing herein contained shall prevent differentials which make only due allowance for difference in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . ." Id.

A second, and much narrower, exception, referred to as the "meeting competition" defense, provides:

> "Upon proof being made . . . that has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, . . . Provided, however, that nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any

> purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." Clayton Act, § 2(b), 15 U.S.C. § 13(b).

Thus, despite common use of the term "competitive discount" to include discounts such as volume discounts, a true "competitive" or "meeting competition" discount within the meaning of the Robinson-Patman Act is only (a) one which is extended in good faith to meet an actual lower offer made to the purchaser by the supplier's competitor in an individual competitive situation, FTC v. A. E. Staley Mfg. Co., 324 U.S. 746, 753 (1945); cf. Callaway Mills Co. v. FTC, 362 F.2d 435 (5th Cir. 1966), or (b) one by which the supplier subsidizes a dealer in order that the dealer can compete effectively in a local price war situation, provided that the dealer's competitors are also being subsidized by their suppliers. See FTC v. Sun Oil Co., 371 U.S. 505, 512 n. 7 (1963). Since the burden of proving the competitive discount justification under § 2(b) is on the defendant, many sellers, including many oil companies, have historically provided such a discount only where the customer executed an affidavit to the effect that it had received an offer of an equally low price from its supplier's

competitor. A seller which extends a competitive discount is under an obligation to determine from time to time whether the competitive situation which created the justification for the discount continues to exist, especially where intervening economic conditions should put the seller on notice that there has been a restructuring of competitive conditions in the marketplace. See In re Beatrice Foods Co., 68 F.T.C. 286, 350-51 (1965).

Thus, price differentials between different purchasers which tend substantially to lesson competition are consistent with the Robinson-Patman Act if they (1) are cost justified; or (2) are necessary in good faith to meet competition. For purposes of applying its pricing regulations, FEA will assume that all discounts and price differentials in effect on May 15, 1973, were permissible under the Robinson-Patman Act.

FEA's class of purchaser requirements are intended to be and should be construed as being consistent with requirements of the Robinson-Patman Act. Thus, in determining whether a price differential in effect on May 15, 1973, was a customary differential which shall be maintained with respect to a class of purchaser, FEA will take into account whether the differential in question falls into one of the

categories of differentials justified under the Robinson-Patman Act.

If a price differential was justified under that Act because it reflected cost savings to the supplier and that differential is otherwise determined pursuant to FEA regulations to represent a "customary" price differential, FEA will generally require that a class of purchaser be established to reflect that differential, since presumably the justifications under the Robinson-Patman Act are as valid currently as they were on May 15, 1973.

If, however, a price differential can be justified only as a competitive discount under § 2(b) (i.e., made in good faith to meet an actual lower bona fide offer or to offset a price war subsidy of a competitor), FEA will not require that a separate class of purchaser be established to reflect that differential. This is so because such dramatic chanage in the pricing and competitive structure of the petroleum industry took place during the summer and fall of 1973 that it is unlikely, at least in the absence of FEA price controls, that a supplier could, at any time after September 1, 1973, justify in a Robinson-Patman Act suit a competitive discount if it existed exclusively on the basis that it was necessary to meet a lower offer

made by a competitor on or before May 15, 1973. Moreover, a true competitive discount does not fall within any of the factors listed in § 212.31 to be taken into account in determining a customary price differential.

The foregoing policy of allowing suppliers to eliminate price differentials originally given in response to local competitive conditions is consistent with the general policy of the class of purchaser doctrine to require sellers to give similar prices to purchasers which are similarly situated, and not to require that random price differentials be maintained. This policy will be followed both at the reseller-retailer level, where potential conflict with the Robinson-Patman Act is readily apparent, and at the end-user level, where there is less likely to be actual competition between purchasers and therefore less possibility of conflict with the Robinson-patman Act. Even though there is less likelihood of conflict with the Robinson-Patman Act at the end-user level, maintenance of price differentials at the end-user level might still, in particular circumstances, result in a lessening of competititon, particularly at the primary line level, as well as frustrate the general policy of

allowing random price differentials to be eliminated.

It is important to point out, however, that certain discounts may have been "competitive discounts" in form, having otensibly been granted to meet a lower offer and with an affidavit having been executed by the buyer to that effect, but may nevertheless also be cost justified under the Robinson-Patman Act. For example, a retail gasoline dealer that owns its retail facility may have been able to obtain a discount from its supplier that was made in good faith to meet a lower bona fide offer. But the willingness of sellers on May 15, 1973 to afford such discounts also reflected cost savings to such sellers, by virtue of the fact that other sales by such sellers were to customers that operated retail facilities owned by and leased from the sellers, and the rental for the facilities was reflected, in part, in the purchase price of gasoline. Similarly, "competitive" discounts on May 15, 1973 may have reflected cost savings attributable volumes purchased or to the fact that the sales were to non-branded rathrer than branded buyers, since in sales to non-branded customers sellers ordinarily do not incur certain expenses or do not provide certain services (such as a trademark license) that are incurred or provided in

connection with sales to branded customers.

Thus, as a general rule the FEA will not require classes of purchaser to be established to maintain price differentials which on May 15, 1973 were in effect only to meet an equally low offer of a competitor. But the FEA will look behind broad assertions that a particular differential was a "competitive" discount and will determine whether in fact the differential was extended to meet a competitive offer and, even if it was, whether it was equally justifiable on a cost basis. Where there is an equally strong cost justification for a "competitive" discount, FEA will require it to be continued.

The position taken herein obviates most of the need for the presumption in Ruling 1974-18, noted above, to the effect that a discount on May 15, 1973 that had been or was exected to be in effect for six months or more is "customary." The presumption was intended to provide guidance primarily on the issue of whether a truly transitory competitive discount was "customary." Since this Ruling concludes that competitive discounts in effect on May 15, 1973 may generally be weight average to determine a single price for all purchasers in a class, regardless of the length of time they

were intended to be in effect, the presumption is no longer necessary, with respect to such discounts. Cost justified discounts, on the other hand, are generally to be considered "customary" regardless of the length of time they had been or were intended to be in effect as of May 15, 1973. Ruling 1974-18 continues to have viability, however, insofar as it provides a means of distinguishing special, short-term sales and other temporary allowances that were neither cost justified nor given in response to competitive conditions, and which represented random price differentials, from longer-term discounts, which are more likely to reflect differences in location, volume, type of purchaser, et., and therefore to represent "customary" price differentials.

C. Class of Purchaser Membership. Rulings 1974-17 and 1974-18 have been incorrectly construed by some persons as requiring a supplier generally to maintain certain discounts in effect on May 15, 1973 to the same purchasers which received them on that date, possibly because the rulings were stated as hypothetical examples involving particular purchasers. No such construction was intended, however. Rather, a supplier must maintain the applicable customary price differential to the same class of purchaser. The membership of the class

is to be determined by the same objective standards applied by the seller on May 15, 1973. Thus, for example, if a paticular customer was receiving a volume discount on May 15, 1973 because its purchases exceeded a certain prescribed volume, the seller does not have to continue to offer the applicable price differential to the same purchaser if that purchaser's volumes decline below that level. On the other hand, a seller is required currently to offer such a price differential to a purchaser which now meets the minimum prescribed volume, even though it may not have done so on May 15, 1973.

While membership in a particular class of purchaser is to be determined by objective standards in effect on May 15, 1973, FEA reiterates the position taken in Rule 1974-17 that a class of purchaser may have only one member, particularly at the end-user level, where a price to a very large volume end-user was often determined on an individually-negotiated basis and reflected a customary price differential between that end-user and all other end-users.

D. Application of This Ruling.

The class of purchasers concepts described in this Ruling will be applied by FEA in deermining the

lawfulness of all prices charged by sellers of covered products since August 19, 1973, the effective date of Phase IV of the Cost of Living Council's price regulations applicable to the petroleum industry. In other words, sellers which have failed, at any time after August 19, 1973, to maintain distinct classes of purchaser and to reflect customary price differentials, as described herein, will be subject to appropriate remedial action, including appropriate refunds. The remedial actions to be taken or sanctions to be imposed with respect to departures from the class of purchaser requirements as expressed in this ruling will be determined on a case-by-case basis, taking into account the extent to which sellers can establish, with respect to past class of purchaser determinations, a good faith basis under the regulations of the manner in which those determinations were made and the extent to which these matters were resolved in prior compliance proceedings.

FEA recognizes that the general rules stated herein for determining what constitutes a separate and distcint class of purchaser for purposes of FEA pricing regulations may not be easily applicable to all of the myriad types of price differentials that existed in May 15, 1973, and that the strict application of these rules might in

fact achieve a result contrary to the general goal that the purchasers which for all practical purposes are similarly situated should be grouped in the same class of purchaser. Therefore, to the extent that strict application of the class of purchaser doctrine, as interpreted herein, does not achieve the desired result or is impractical, both purchasers and sellers adversly affected should, pursuant to Subpart D of 10 CFR, Part 205, promptly apply to the FEA for an exception from the class of purchaser rule. Similarly, any seller which finds the application of this ruling to its business to be unclear should promptly submit to FEA the relevant facts together with a request for interpretation of those aspects of the ruling applications to its particular factual situation.

Illustrative Examples

The foregoing general principles are illustrated by the following examples, which are equally applicable to all sellers, including refiners, resellers, reseller-retailers and retailers.

. . .

Example 5:

On May 15, 1973, Firm E, a refiner, had in effect at a particular terminal a posted

end-user tankwagon price for gasoline of 16.5 cents per gallon. While Firm E had no generally applicable volume or other discount schedule available for end-users, it did make available to most of its very high volume end-users certain discounts from the end-user tankwagon price, the amounts of which were determined on an individually negotiated basis. Some such discounts were granted after an equally low offer had been made by a competitor, but others had no such apparent rationale.

In this situation, it is apparent, notwithstanding the fact that certain of the end-user discounts Firm E had in effect on May 15, 1973, were ostensibly granted to meet competition, that for pricing purposes Firm E distinguished its large and small volume end-user customers principally on the basis of volumes purchased. Therefore, Firm E is required to establish a separate class of purchaser for its low volume end-user purchasers and one or more other classes of purchaser for its high volume end-user purchasers. For each class Firm E is required to establish a separate base price by computing the weighted average price to all customers in the class on May 15, 1973, taking into account all temporary or permanent discounts and allowances. The maintenance of these price differentials between high and low volume customers was presumptively valid under the Robinson-Patman Act on May 15, 1973 because they were cost-justified, and therefore they will continue to be so regarded.

. . .

Example 7:

On May 15, 1973, Firm G charged most of its 500 branded dealers a dealers tankwagon price of 15 cents per gallon for motor gasoline. Included in those dealers were 25 which sold gasoline in connection with car wash operations which they owned. Of the 25 car wash dealers, Firm G had given 20 of them various discounts, determined on an individual basis, to meet equally low offers of competitors. Similar competitive discounts were given to four of Firm G's non-car wash dealers. All of the 25 car wash dealers sold approximately equal volumes of gasoline, and all of them had substantially greater capital investments in their stations and sold higher volumes of gasoline than the rest of Firm G's dealers.

The application of the class of purchaser doctrine here should be similar to its application in Example 5. Firm G is required to treat all 25 of the car wash dealers as being in the same class of purchaser and in a distinct class of purchaser from its 475 non-car wash dealers. This is so because the higher volumes and the substantially greater investments in their stations of the car wash dealers are in themselves justifications under the Robinson-Patman Act for treating the car wash dealers differently. Firm G is not required,

however, to maintain separate classes of purchaser for those car wash dealers that had competitive discounts in effect on May 15, 1973 and those car wash dealers that, did not, since those car wash dealers that had discounts in effect are distinguishable from other car wash dealers only in that they had received lower offers from a competitor of Firm G. Similarly, with the non-car wash class, Firm G need not maintain a separate class of purchaser for four non-car wash dealers that received discounts given only to meet competition. The May 15, 1973 lawful selling price component of Firm G's base price for the non-car wash class is therefore the weighted average of 15 cents per gallon for 471 dealers and the lower May 15, 1973 prices afforded to four dealers; the May 15, 1973 lawful selling price component of its base price for the car wash class of purchaser is the weighted average of 15 cents per gallon for five dealers and the lower May 15, 1973 prices afforded to the other 20 members of the class.

. . .